Supreme Court, U. S.
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80-1084

No. _____

IN THE

Supreme Court of the United States

October Term, 1980

MOUNTAIN STATES LEGAL FOUNDATION, et al.,
Petitioners,

versus

DOUGLAS M. COSTLE,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Questions relating to the merits:

1. In order to force the Colorado General Assembly to enact an automobile emission control inspection and maintenance program, the Environmental Protection Agency withheld over $300 million in federal highway and sewage treatment facility funds and imposed a ban on major industrial construction. Did the EPA action violate the constitutional political rights of legislators and citizens by:

(a) removing decisionmaking regarding the establishment of a state program from the legislature and placing it in the hands of a national administrative agency, thereby attenuating political accountability, destroying the legislative discretion of elected officials, and removing ultimate control over legislators from the people of the state?

(b) restricting legislative debate and public input into the legislative process by imposing a deadline for enacting legislation?

(c) chilling legislative expression and compelling political conformity?

(d) coercing state legislators to pass legislation meeting federally imposed criteria, and thereby interfering with the integral state function of deliberative lawmaking?

2. Has the EPA Administrator exceeded his authority under the Clean Air Act by:

(a) using withholdings of federal highway and sewage treatment funds inappropriately and coercively to obtain state legislative action?

(b) "conditionally approving" the state implementation plan submitted by Colorado rather than either approving or disapproving the plan?

(c) placing a moratorium on new industrial construction

without having specific authority in the state implementation plan?

Questions relating to the standing of petitioners:

1. Where legislators and citizens alleged that EPA actions deprived them of constitutional rights, and further alleged that EPA actions in violation of the Clean Air Act directly and monetarily affected them, did these petitioners have standing to challenge EPA actions?

2. Did the court of appeals err in holding that the State of Colorado was the "real party in interest" and hence the only party with standing to challenge EPA action regarding the state air pollution control implementation plan?

IN THE SUPREME COURT OF THE UNITED STATES

MOUNTAIN STATES LEGAL FOUNDATION, a non-profit corporation, on behalf of its members who are citizens of the State of Colorado; THE FOLLOWING MEMBERS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF COLORADO IN THEIR RESPECTIVE OFFICIAL CAPACITIES AS INDIVIDUALLY ELECTED LEGISLATORS OF THE STATE OF COLORADO: Senator FRED E. ANDERSON; Senator DAN D. NOBLE; Senator L. DUANE WOODARD; Senator DONALD A. SANDOVAL; Representative ROBERT F. BURFORD; Representative JOHN G. HAMLIN; Representative W. H. (Bill) BECKER; Representative BOB LEON KIRSCHT; Representative CARL B. BLEDSOE; Representative C. MICHAEL CALLIHAN; Senator RALPH A. COLE; Representative FRANK DE FILIPPO; Representative STEVEN J. DURHAM; Representative CARL H. GUSTAFSON; Representative WILLIAM F. HILSMEIER; Senator DON MacMANUS; Representative JOHN R. McELDERRY; Representative RAY POWERS; Representative FRANK H. RANDALL; Representative PAUL D. SCHAUER; Representative BEV SCHERLING; Representative JAMES M. SHEPARD; Representative CARL E. SHOWALTER; Representative A. J. (Mick) SPANO; Representative KATHY SPELTS; Representative NICK THEOS; and the STATE OF COLORADO *ex rel.* MOUNTAIN STATES LEGAL FOUNDATION,

Petitioners,

v.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ROGER L. WILLIAMS in his official capacity as Regional Administrator of Region VIII of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and the STATE OF COLORADO *ex rel.* J. D. MacFARLANE,

Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT AUTHORITIES 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

I. E.P.A.'s DEMAND THAT THE STATE LEGISLATURE ENACT A NEW INSPECTION AND MAINTENANCE PROGRAM OR FACE SEVERE SANCTIONS VIOLATED THE CONSTITUTIONAL RIGHTS OF LEGISLATORS AND CITIZENS 5

A. The EPA action destroys the constitutional balance of national and state powers 6

1. The concept of federalism embodied in the Constitution prevents the national government from interfering with sovereign state government functions 7

2. EPA's action unconstitutionally coerces the state legislature and thereby displaces state decisionmaking, in excess of the commerce and spending powers 8

3. Preemption is the only constitutional way for the national government to regulate in the absence of state cooperation 11

B. The EPA action destroys the process of political accountability that is crucial to constitutional government 12

II. THE E.P.A. ADMINISTRATOR'S ACTIONS EXCEEDED HIS AUTHORITY UNDER THE CLEAN AIR ACT..... 15

III. THE COURT OF APPEALS ERRED IN DENYING PETITIONERS STANDING TO ASSERT THEIR RIGHTS UNDER THE CONSTITUTION AND THE CLEAN AIR ACT 17

A. As a result of the EPA action, petitioners have suffered injury in fact in the form of economic harm and deprivation of their constitutional rights..... 17

B. Petitioners have standing as aggrieved parties to seek judicial review under section 307 of the Clean Air Act..... 20

C. Petitioners have shown standing to assert violation of their constitutional rights and thus may address all issues properly before the Court. 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

Page

Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975)..... 6
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)..... 18
ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978)..... 21
Association of Data Processing Services Organizations, Inc. v. Camp, 397 U.S. 150 (1970)..... 17
Baker v. Carr, 369 U.S. 186 (1962)..... 15
Bond v. Floyd, 385 U.S. 116 (1966)..... 15
Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1977)..... 6, 11
Citizens to Save Spencer County v. EPA, 600 F.2d 844 (D.C. Cir. 1979)..... 21
Coleman v. Miller, 307 U.S. 433 (1939)..... 18
Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945)..... 16
Coyle v. Smith, 221 U.S. 559 (1911)..... 8
District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub. nom. EPA v. Brown*, 431 U.S. 99 (1977)..... 6, 11
Duncan v. McCall, 139 U.S. 449 (1891)..... 15
Dunn v. Blumstein, 405 U.S. 330 (1972)..... 8
EPA v. Brown, 431 U.S. 99 (1977)..... 6, 7
Friends of the Earth v. EPA, 499 F.2d 1118 (2d Cir. 1974)..... 21
Fry v. United States, 421 U.S. 542 (1975)..... 7
Gravel v. United States, 408 U.S. 606 (1972)..... 14
Harley-Davidson Motor Co. v. EPA, 598 F.2d 228 (D.C. Cir. 1979)..... 21
Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977)..... 19
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)..... 2
Indiana and Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975)..... 21
Kansas v. Colorado, 206 U.S. 46 (1907)..... 13

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)..... 18
Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869)..... 9, 13
Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977)..... 6, 8
Maryland v. Wirtz, 392 U.S. 183 (1968)..... 6
McCoy-Elkhorn Coal Corp. v. EPA, 622 F.2d 260 (6th Cir. 1980)..... 21
Montgomery County v. Califano, 449 F. Supp. 1230 (D. Md. 1978)..... 10
National League of Cities v. Usery, 426 U.S. 833 (1976)..... 7, 8, 9, 13, 22
NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973)..... 21
NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974)..... 21
Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947)..... 7, 10
Oregon v. Mitchell, 400 U.S. 112 (1970)..... 8
Pacific Legal Foundation v. Costle, No. 80-828 (U.S., petition for cert. filed Nov. 22, 1980)..... 6
Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974)..... 6
Powell v. McCormack, 395 U.S. 486 (1969)..... 13
Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978)..... 19
Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4 (1942)..... 22
Sharon Steel Corp. v. EPA, 597 F.2d 337 (3d Cir. 1979)..... 21
Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978)..... 22
Sierra Club v. Morton, 405 U.S. 727 (1972)..... 22
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974)..... 21
Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944)..... 13
Steward Machine Co. v. Davis, 301 U.S. 548 (1937)..... 9, 10
Stromberg v. California, 283 U.S. 359 (1931)..... 15
Tenney v. Brandhove, 341 U.S. 367 (1951)..... 14
United States v. Brewster, 408 U.S. 501 (1972)..... 14
United States v. Butler, 297 U.S. 1 (1936)..... 9, 10
United States v. Carolene Products Co., 304 U.S. 144 (1938)..... 12
United States v. Darby, 312 U.S. 100 (1941)..... 7
United States v. Harriss, 347 U.S. 612 (1954)..... 14, 15

United States v. Helstoski, 442 U.S. 477 (1979) 14
United States v. SCRAP, 412 U.S. 669 (1973) 18
Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) 8
Warth v. Seldin, 422 U.S. 490 (1975) 22
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 14

Constitution, Statutues and Regulations

Page

United States Constitution:
Article I, § 6 (Speech or Debate Clause) 14
Article I, § 8 (Commerce Clause) 7
Article IV, § 4 (Guaranty Clause) 1, 12, 15
Amendment I 1, 4, 14, 15, 22
Amendment X 1, 4, 7, 8, 11, 13, 22
5 U.S.C. § 702 (1976) 22
28 U.S.C. § 1254(1) (1976) 1
33 U.S.C. § 1319 (Supp. I 1977) 10
Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. I 1977):
Section 110, 42 U.S.C. § 7410 ..... 1, 16
Section 110(c), 42 U.S.C. § 7410(c) 11
Section 172, 42 U.S.C. § 7502 16
Section 176, 42 U.S.C. § 7506 1
Section 176(a), 42 U.S.C. § 7506(a) 16
Section 304, 42 U.S.C. § 7604 ..... 6, 20
Section 307, 42 U.S.C. § 7607 ..... 1, 2, 20, 21, 22
Section 316, 42 U.S.C. § 7616 ..... 1, 16
Colo. Rev. Stat. § 42-4-312(1)(c)(1973) (as amended by Senate Bill 52) 18
Colo. Rev. Stat. § 42-4-313(4) (1973) (as amended by Senate Bill 52) 18
Colo. Senate Bill 1, 1979 Colo. Sess. Laws 406 ..... 2, 3, 18, 19
44 Fed. Reg. 37679 (1979) 17
44 Fed. Reg. 57401 (1979) 1
45 Fed. Reg. 47683 (1980) 4

Other Authorities

Page

Comment, *The Federal Conditional Spending Power: A Search for Limits,* 70 Nw. U.L. Rev. 293, 303 (1975)..... 10

Kaden, *Federalism in the Courts: Agenda for the 1980's,* in Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980's (to be published 1981)..... 13

Palmer, *The Case for a Speech or Debate Privilege for State Legislators in Federal Courts,* 13 Valparaiso U.L. Rev. 501 (1979)..... 14

Ripple & Kenyon, *State Sovereignty—A Polished But Slippery Crown,* 54 Notre Dame Lawyer 745, 759 (1979)..... 11

Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1257 (1977)..... 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, twenty-seven members of the Colorado General Assembly, including the leadership of both the Democratic and Republican parties, and Mountain States Legal Foundation on behalf of its officers, members, and supporters, respectfully request that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in this proceeding.

OPINIONS BELOW

On petition for review of a final rulemaking action of the Environmental Protection Agency, 44 Fed. Reg. 57401 (1979), the Tenth Circuit Court of Appeals rendered a decision that is reported at 630 F.2d 754 (1980). The court's decision is included herein as Appendix A; the EPA order appears herein as Appendix B.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was rendered on August 29, 1980. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 6, 1980. The order denying the petition is included herein as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(1976).

RELEVANT AUTHORITIES

The following authorities are relevant in resolving the issues of this case: Section 307 of the Clean Air Act, 42 U.S.C. §7607 (Supp. I 1977), was the basis for petitioners' standing in the Tenth Circuit. Petitioners have alleged violations of sections 110, 176, and 316 of the Clean Air Act, 42 U.S.C. §§7410, 7506, 7616 (Supp. I 1977), and of the United States Constitution, article IV, §4, and amendments I, V, and X. Because these provisions are lengthy, the pertinent text is appended hereto as Appendix D.

STATEMENT OF THE CASE

Jurisdiction of the Tenth Circuit Court of Appeals was predicated on section 307 of the Clean Air Act, 42 U.S.C § 7607 (Supp. I 1977), which vests jurisdiction for review of EPA administrative orders in the courts of appeals. *See also* Fed. R. App. P. 15.

This controversy stems from an EPA demand that the State of Colorado change its automobile emission inspection and maintenance (I/M) legislation to meet certain EPA criteria, or face the imposition of over $300 million in fund withholding sanctions and an industrial construction moratorium. Petitioners presented evidence that the threatened sanctions, amounting to approximately 15% of the state's total budget, would cause a deprivation of vital services, thousands of lost jobs, and disruption of the Colorado economy.

Mountain States Legan Foundation[1] and twenty-seven members of the Colorado General Assembly, including both Democratic and Republican leadership[2], filed suit to challenge EPA's demand for legislative action and its threats to impose massive sanctions as unjustified interference with the government and people of Colorado.

In the 1979 legislative session, the Colorado General Assembly passed Senate Bill 1, which commissioned a study to compare two alternate approaches to automobile emissions control. The Bill also provided that if no subsequent action was taken by the legislature, a program that was a hybrid of the two approaches would automatically go into effect on January 1, 1981.

When Senate Bill 1 was passed, legislators believed that it would be acceptable to EPA. *See* Appendix B at 40a. However, EPA's final

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[1]Mountain States Legal Foundation is a non-profit public interest law center, dedicated to bringing before the courts those issues vital to the individual rights and freedoms protected by the United States Constitution and the nation's legal traditions. The Foundation is supported entirely by the donations of its members. In this lawsuit the Foundation represented its officers, members, and supporters residing within the nonattainment areas wherein the EPA has required that an I/M program be established, and also those residing in the remainder of Colorado. Mountain States Legal Foundation has standing to assert the interests of its members whose rights are affected by the EPA action. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

[2]This lawsuit does not concern the advantages or disadvantages of I/M programs. The legislators who are parties to this lawsuit represent all points of view on the I/M question.

rulemaking action challenged herein required the legislature to amend specific provisions of the Senate Bill 1 program or face the imposition of severe sanctions. The EPA ruling was in the form of a "conditional approval" of the relevant portions of the state implementation plan (SIP). Failure to pass complying legislation would result in disapproval of the SIP and imposition of sanctions until such time as the state should acquiesce.

The EPA order set specific deadlines and directives for state executive and legislative action. For example, EPA demanded that legislation be introduced by February 1, 1980, and that it be passed by the legislature and signed by the Governor by March 1, 1980. This crucial timetable is set forth in full in the Tenth Circuit's opinion, as well as in the EPA rulemaking announcement. Appendix A at 4a-5a and Appendix B at 40a.

For failure to comply with this timetable, EPA's order threatened to impose severe sanctions, which included withholding $132 million in sewage facility construction grants, withholding and unspecified amount (later set at over $165 million) of highway construction and air pollution control grants, and banning new industrial construction in Colorado's major cities. Appendix B at 43a-46a. The sanctions threatened were so severe as to portend economic disruption for the state if they continued for a significant period of time. *See* section III. A. *infra*. It is important to note that the funds which EPA threatened to withhold were *not* funds for the establishment or operation of an I/M program. EPA threatened to accelerate the imposition of sanctions should the state fall behind schedule in passing legislation. Appendix B at 44a.

Petitioners[3] filed the instant petition for review of the EPA action in December 1979 in the court of appeals. The Colorado Attorney General intervened a few weeks later. The Attorney General sought primarily to have the court define the limits of federal authority *vis-a-vis* the states without reference to the instant conflict between the state and EPA.

The Attorney General did not strongly pursue tenth amendment issues in its brief or oral arguments, but it did *raise* these issues. The Attorney General's brief stated that applying sanctions because legislative authority was not in place on March 1, 1980, if reasonable progress was being made toward adoption of an I/M

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[3]Mountain States Legal Foundation originally filed this suit as *ex relatione* counsel for the State of Colorado. Following the intervention of the Colorado Attorney General, petitioners did not actively pursue standing in that capacity.

statute, would be an arbitrary exercise of the Adminsitrator's authority under the statute and also would be contrary to the tenth amendment." Brief of Intervenor at 8.

The day before EPA announced it would begin imposing sanctions, the Tenth Circuit granted petitioners' motion to stay the imposition of sanctions until May 1, 1980. When the stay expired, the Colorado Attorney General moved for an additional stay, but this motion was denied on May 7, 1980. On that date, the legislature passed new I/M legislation, which was subsequently approved by EPA. Sanctions officially remained in effect against Colorado from May 2 until July 16, 1980. 45 Fed. Reg. 47683 (1980).

I/M legislation passed the Colorado General Assembly only narrowly, and many legislators stated in floor debates that they voted for the legislation in its existing form only because the EPA had blackmailed them into cooperation. The number of legislators who voted for the I/M bill, yet stated they did so only because of EPA's coercion, exceeded the "swing vote."[4] In short, the Colorado General Assembly would not have passed EPA's version of I/M legislation without EPA coercion. Furthermore, bills have been pre-filed for the 1981 session of the Colorado legislature which will rescind or alter the 1980 I/M legislation.

The Tenth Circuit's decision did not reach the merits of the petitioners' arguments; it noted only that Mountain States Legal Foundation and the legislators had raised "a panoply of serious constitutional and statutory contentions." Appendix A at 27a. The Tenth Circuit based its ruling upon a lack of standing to bring tenth amendment and Clean Air Act arguments. The court did not accord the petitioners standing as to their claims involving denial of their own first amendment and other personal rights.

SUMMARY OF THE ARGUMENT

The petitioners, as legislators and citizens of Colorado, were injured in fact by EPA action and were within the zone of interests protected by the statutes and constitutional provisions involved herein. The petitioners thus had standing to assert their rights, particularly first amendment rights, and such standing was not destroyed by the failure of the State of Colorado to strongly present

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[4]I.e., the number of legislators who would have to change their votes in order to reverse the final outcome of the vote.

sovereignty arguments.

Inherent in the Constitution is a federal form of government that allows for maximum input by citizens and that establishes clear lines of authority and accountability. Administrative actions that unnecessarily disrupt this essential balance between the state and national governments are invalid and, if provisions of the Clean Air Act are interpreted to allow such actions, those provisions should be declared unconstitutional.

The voices of citizens attempting to participate in the legislative process were drowned out by the more powerful voice of the national government, threatening imposition of sanctions if the state failed to comply. Legislator-petitioners were forced to take legislative positions different from what they would have chosen absent EPA pressure. The rights of citizens and legislators were thus violated by the EPA Administrator.

The uncertain nature of national/state relations demands further clarification from this Court. Petitioners assert that the court of appeals erred in denying petitioners, as citizens and legislators, an opportunity to raise the constitutional issues that directly affect them, and petitioners urge this Court to utilize EPA's egregious interference with state decisionmaking as a forum for elucidating the issues of political accountability raised herein.

REASONS FOR GRANTING THE WRIT

I. E.P.A.'s DEMAND THAT THE STATE LEGISLATURE ENACT A NEW INSPECTION AND MAINTENANCE PROGRAM OR FACE SEVERE SANCTIONS VIOLATED THE CONSTITUTIONAL RIGHTS OF LEGISLATORS AND CITIZENS.

The strength of the federal structure of the United States government is of continuing importance to citizens. A national government interference with state government affects, not just the state as an abstract entity, but also the constitutional rights of citizens and legislators. Resolution of the present conflict between Colorado citizens and the EPA will have a significant impact on EPA's policy in Colorado and other states regarding Clean Air Act implementation. However, it will have much more profound impact in determining whether the constitutional rights of citizens to a politically responsive government will be preserved.

The primary concern of petitioners in pursuing this litigation is to ensure the survival of the federal form of government and of the

political accountability inherent in that form. Briefly, this case illustrates that recent congressional attempts at "cooperative federalism" are, in reality, "coercive federalism." The state is left with no realistic option but to acquiesce to EPA's demands. The federal agency controls the enactment and operation of a state program, and consequently the state legislature's constituents lose their voice in state government. State elected officials are prevented from performing their representational duties.

A. The EPA action destroys the constitutional balance of national and state powers.

This case is only one small part of a continuing major problem: preserving the constitutional balance of powers between the national and state governments. One of the primary areas of conflict has been the "cooperative federalism" scheme created by the Clean Air Act. The constitutionality of the EPA's continuing attempt to demand state legislation regarding automobile I/M programs was seriously questioned by three U.S. Circuit Courts of Appeals in *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F. 2d 971 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1977). These cases were consolidated in the Supreme Court decision in *Brown v. EPA, supra*.[5]

In each of the decisions reviewed by this Court, the court of appeals struck down, as being in excess of statutory authority, EPA regulations that directed state legislatures to establish an I/M program, but the courts further noted that grave constitutional issues might be raised by the EPA interpretation of the Clean Air Act. *See* 431 U.S. at 102. In particular, the courts noted that serious

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[5]Two other cases addressing this point were also decided but did not reach the Supreme Court for review: *Pennsylvania v. EPA*, 500 F.2d 246 (3rd Cir. 1974); *Alaska v. EPA*, 521 F.2d 842 (9th Cir. 1975). Of the six circuit court decisions, only *Pennsylvania v. EPA* held that the EPA had power to require establishment of a state I/M program. It relied heavily on the subsequently overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), and thus the continuing validity of the decision is suspect.

A petition for certiorari has been filed in this Court in the case of *Pacific Legal Foundation v. Costle*, No. 80-828. Although the underlying issues of that litigation resemble the instant case, the factual situation raised entirely different procedural problems. *Pacific Legal Foundation* was filed pursuant to section 304 of the Clean Air Act, 42 U.S.C. § 7604 (Supp. I 1977).

state sovereignty issues were presented by the Administrator's actions. The EPA's appeal from serveral circuit court decisions holding the imposition of sanctions to be unconstitutional was vacated as moot when the EPA Administrator conceded a lack of authority to impose requirements on the state and therefore withdrew his regulations. 431 U.S. at 103. Thus this Court has not yet provided guidance for evaluating EPA's authority to dictate legislation to states.

A new analysis of constitutional principles is necessary because of the change in circumstances created by the growth of the national government during the past few decades. Never before could the national government threaten such large cutbacks, on a percentage basis, of a state's budget. Only recently has the national government acquired the power to pull strings on state government actions. When the "balance" of power between the states and national government was more than just a theoretical concept, the distortion of the political process herein challenged could not have occurred. It was not possible for the federal government to force states to enact legislation; states truly had "the simple expedient of not yielding." *Oklahoma v. Civil Service Commission.* 330 U.S. 127, 143 (1947).

From the time that the tenth amendment was introduced in the first session of Congress to quell the states' fears about surrendering power to a central government, *United States v. Darby,* 312 U.S. 100, 124 (1941), the courts have grappled with the delineation of state and national spheres of power. This controversy calls upon the Court to make a major decision regarding the future relationship of the national and state governments.

1. *The concept of federalism embodied in the Constitution prevents the national government from interfering with sovereign state government functions.*

The most important recent judicial pronouncement regarding state sovereignty is *National League of Cities v. Usery,* 426 U.S. 833 (1976). The Court set forth the basic rule that Congress may not exercise its authority, even under the otherwise plenary commerce power, in a manner that "impairs the States' integrity or their ability to function effectively in a federal system," 426 U.S. at 843, quoting *Fry v. United States,* 421 U.S. 542, 547n.7 (1975). An action which operates to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" is beyond the scope of congressional power. 426 U.S. at

852. The application of this rule is far from clear, and further explanation by this Court is necessary.

An integral state function is an activity "essential to separate and independent existence" of the state, *Coyle v. Smith,* 221 U.S. 559 (1911), quoted in *National League of Cities,* 426 U.S. at 845. In *Coyle,* the activity at issue was the selection of a site for the state capitol and in the *National League of Cities,* it was the determination of pay and working conditions of state employees. The activity at issue here is state legislative decisionmaking.

There is no state government function as basic and essential to the existence of a state as deliberative lawmaking by the state legislature. This Court has recognized that the powers reserved to the states by the tenth amendment include "the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government. . . ." *Veazie Bank v. Fenno,* 75 U.S. (8 Wall.) 533, 547 (1869). *See also Oregon v. Mitchell,* 400 U.S. 112 (1970); *Dunn v. Blumstein,* 405 U.S. 330 (1972). In the challenge to the EPA requirement that the State of Maryland enact an I/M program, the Fourth Circuit said, "[I]f there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws." *Maryland v. EPA,* 530 F.2d 215, 225 (4th Cir. 1975).

2. *EPA's action unconstitutionally coerces the state legislature and thereby displaces state decisionmaking, in excess of the commerce and spending powers.*

National League of Cities, supra, analyzed state sovereignty as limiting the commerce power. In contrast, this case presents a combined exercise of the commerce power and the spending power. Certain aspects of the Colorado situation raise the crucial issue of congressional power to condition funding that was left unresolved by *National League of Cities,* 426 U.S. at 852 n.17.

National League of Cities established the basic framework for analysis of constitutionality under the commerce power. Essentially, courts must determine whether the national government has exercised its commerce power authority in a manner that "displaces" state decisionmaking regarding an integral state government function. 426 U.S. at 852. In the present case, the EPA is attempting to interfere in one of the most essential state functions — lawmaking — by imposing severe and unnecessary sanctions against the states. The result is to shift decisionmaking from the

state to the national government and to destroy the state's autonomy. The severity of EPA's intrusion into state affairs violates the basic constitutional principles of federalism.

The national government is constitutionally prohibited from interfering with the "functions essential to separate and independent existence" of the states, *National League of Cities,* 426 U.S. at 845, quoting *Lane County v. Oregon,* 74 U.S. (7 Wall.) 71, 76 (1869). The constitutional limitation was explicitly and clearly stated in *National League of Cities:*

> Congress may not exercise that power [i.e., the commerce power] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

426 U.S. at 855. EPA's coercion of the Colorado General Assembly interferes with integral state government functions and thus exceeds the commerce power under *National League of Cities.*

Although there is a need for further clarification of commerce power analysis, there is a considerably more pressing need for delineation of the spending power. Boundaries upon the use of the national government's spending power have never been clearly established by this Court. The law is presently in a state of confusion on this major issue, and it is submitted that the instant case presents a valuable opportunity for clarification. Petitioners argue that EPA's action is just as certainly unconstitutional under spending power analysis because the spending power is limited where it begins to interfere with state sovereignty. *See United States v. Butler,* 297 U.S. 1 (1936).

To determine the constitutionality of conditions placed upon federal funding, petitioners urge the Court to examine whether:

(1) The national government action interferes with an integral state government function. (The interference with state lawmaking was discussed above).

(2) The spending power is exercised in a *coercive* manner. *Steward Machine Company v. Davis,* 301 U.S. 548 (1937).

Steward Machine discussed the constitutionality of various degrees of pressure brought to bear upon the states by the national government. It established a distinction which is applicable here, although *Steward Machine* presented a substantially different factual situation. The primary consideration in assessing the constitutionality of national government actions is whether those actions are "weapons of coercion, destroying or impairing the autonomy of the states." 301 U.S. at 586. The Court further elucidated:

> [T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, — at times, perhaps, of fact.

301 U.S. at 590. Thus the relevant determination under *Steward Machine* is whether the EPA's action has gone beyond the bounds of mere "inducement" and become "coercion." For several reasons, the petitioners urge that such coercion exists in the present situation and that the coercion analysis would be an appropriate method for testing national government authority.

The degree to which funds subject to withholding are related to the compliance sought may be an important factor in determining whether coercion exists. The often-reiterated reason for finding that conditions placed on funding are not coercive is that the state may simply choose not to participate in the offending program. *Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947). However, that option becomes illusory when the condition is attached to a variety of major funding programs. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1257 (1977). A state may be willing to forego participation in a particular program in order to avoid objectionable conditions, but be unable to risk the loss of all federal funding. Here, for example, the state had no realistic choice but to give in to EPA demands. An unrestricted power "to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power." *United States v. Butler,* 297 U.S. at 74.

When the federal government threatens a state with economic crisis, its demands must surely be seen as coercive. Comment, *The Federal Conditional Spending Power: A Search for Limits,* 70 Nw. U.L. Rev. 293, 303 (1975). The states' overwhelming dependence on federal funds makes federal coercion a serious concern because "economic pressure may threaten such havoc to a state's well being as to cause the federal legislation to cross the line which divides inducement from coercion. . . ." *Montgomery County v. Califano,* 449 F. Supp. 1230, 1247 (D. Md. 1978).

Furthermore, other consequential effects on the state must be considered. For example, the withholding of sewage treatment grants could cause the subdivisions of the state to violate the Federal Water Pollution Control Act and to incur penalties under 33 U.S.C § 1319 (Supp. I 1977).

If conditions placed on funding are confined to those which ensure proper expenditure of the federal funds, the danger of misuse

of the national government's dominant position is not as great. But the EPA conditions, including passage of I/M legislation, did not apply to administration of the spending programs; the EPA instead used the offer of national government funds in one area "to force surrender of tenth amendment autonomy in another." Ripple & Kenton, *State Sovereignty — A Polished But Slippery Crown,* 54 Notre Dame Lawyer 745, 759 (1979).

Review by this Court is necessary to provide guidance to Congress and the states about when conditions on funding become an unconstitutional intrusion into state sovereignty.

3. *Preemption is the only constitutional way for the national government to regulate in the absence of state cooperation.*

The supremacy clause does not provide any authority for the national government to pursue its current course of action through the EPA. Instead, it provides one constitutionally permissible means for the national government to accomplish its objectives — through the mechanism of preemption. The national government may prevent the states from regulating a field; it may not conscript state authority to regulate that field in a manner dictated by Congress. *See District of Columbia v. Train,* 521 F.2d 971 (D.C Cir. 1975).

The Clean Air Act, section 110(c), 42 U.S.C. § 7410(c) gives the EPA Administrator authority to promulgate a federal plan if the state does not enact a satisfactory SIP. This means of regulating is constitutionally preferred over making the states into "puppets of a ventriloquist Congress." *Brown v. EPA,* 521 F.2d 827, 839 (9th Cir. 1975).

Establishment of a federal I/M program in Colorado would be merely physically intrusive, in the same negligible manner that existence of the federally operated Post Office is intrusive. In contrast, the EPA tactic of establishing an I/M program by coercing the state into passing legislation funding its own program distorts the state decisionmaking process and destroys the federal system. EPA should not be allowed to utilize a means that intrudes upon constitutional structures and freedoms when a much less intrusive and less restrictive means is available.

The foregoing brief analysis of state sovereignty reveals that the instant case presents a compelling factual situation — where an interference with state decisionmaking actually occurred because of

national government coercion — and also presents legal issues with immense future ramifications. The true urgency of the state sovereignty analysis does not arise, however, from the national government actions' impact upon the state *per se,* but rather from the impact on citizens and officials of the affected state. The following section analyzes the constitutional deprivations which have occurred as a result of the EPA's usurpation of state decision-makion analyzes the constitutional deprivations which have occurred as a result of the EPA's usurpation of state decisionmaking.

B. The EPA action destroys the process of political accountability that is crucial to constitutional government.

A basic component of the American constitutional system is the accountability of government to the people. A representative form of government anticipates that citizens can voice their views to elected officials and those officials can then act to meet the needs of their constituents. This structure of political accountability was incorporated into the Constitution through, *inter alia,* the guarantee of a republican form of government in article IV, section 4, the freedom of speech, and the citizens' right to petition the government. An essential structural safeguard of political accountability is the division of power and responsibilities between the state and national governments, each of which is a representative government and each of which must therefore be accountable to the electorate.

The EPA action distorts this essential political structure by forcing the Colorado General Assembly to sign its name to legislation mandated by the federal agency. The EPA has essentially tried to get its own program enacted while avoiding political reprisals if the program is ineffective or burdensome and while forcing the state to fund the program.

If the program proves unworkable, to whom do citizens turn for redress? Not to the legislature — revocation of the I/M law would presumably evoke the same sanctions, and thus the legislature could not act. Not to the EPA — the program in question is a matter of state law. Thus the citizens are denied effective recourse. *See United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938), suggesting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny."

The right of citizens to a politically accountable government — *i.e.*, a government that can respond to the electorate or be voted out of office — is basic to this nation's constitutional structure. A recent article by Professor Lewis B. Kaden summarizes the reasons that a federal form of government is desirable: (1) It increases opportunities for public communication with officials. ("Proximity increases accountability by increasing access.") (2) It promotes variety in political choice by allowing cultural differences to find expression in different places. (3) It permits the states to serve as laboratories for experimentation. Beyond these factors, Kaden found that "the case for a federal form rests most fundamentally on the capacity of a federal system to enhance and protect individual liberty." Kaden, *Federalism in the Courts: Agenda for the 1980's*, in Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980's (to be published 1981).

The tenth amendment is not the only Constitutional basis for the federal structure of government. In *Kansas v. Colorado*, 206 U.S. 46, 81 (1907), this Court emphasized that the national government's role as exercising just enumerated powers "appears from the Constitution, independently of the Amendments." This point was also made in *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869), quoted in *National League of Cities*, 426 U.S. at 844, where the Court noted that "in many articles of the Constitution the necessary existence of the states, and within their proper spheres, the independent authority of the states, is distinctly recognized."

One part of the Constitutional structure of political accountability is the right and responsibility of legislators to speak freely. The elected representatives of the people are charged with faithfully fulfilling their obligation to their constitutents based upon their own best judgment and the expressed wishes of the people. "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). To perform this obligation to represent constituents, it is necessary that legislators be protected from external pressures that would override the electorate's concerns. *Powell v. McCormack*, 395 U.S. 486, 503 (1969), quotes the writings of James Wilson:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resent-

> ment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

See also, United States v. Harriss, 347 U.S. 612 (1954).

A legislator's freedom of speech is hampered by fear of reprisal to his constituents should he choose to speak and vote freely. Such forced compliance is antithetical to the first amendment. This Court eloquently stated the proposition in *West Virginia State Board of Education v. Barnette,* 319 US. 624, 641 (1943):

> We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Another constitutional provision illustrating the need for legislative independence is the speech or debate clause, U.S.Const. art. I, § 6. This Court noted in *United States v. Brewster,* 408 U.S. 501, 507 (1972), that the purpose of the clause was "to protect the integrity of the legislative process by insuring the independence of individual legislators." *See also United States v. Helstoski,* 442 U.S. 477, 492 (1979). This independence includes freedom from control by other segments of the government. *Gravel v. United States,* 408 U.S. 606, 618 (1972). Although the speech or debate clause does not, by its terms, apply to state legislators, a similar immunity for them has often been recognized, based on the same underlying principles. *See Tenney v. Brandhove,* 341 U.S. 367 (1951); Palmer, *The Case for a Speech or Debate Privilege for State Legislators in Federal Courts,* 13 Valparaiso U.L. Rev. 501 (1979).

EPA imposed strict deadlines for legislative action in its order, and it provided that the imposition of sanctions would be accelerated if the state fell behind schedule. Appendix B at 44a. Limiting the time for legislative debate had a chilling effect on freedom of expression by the legislators and restricted input by citizens.

These restrictions on legislative action, i.e., violating the first amendment rights of legislators by limiting debate, forcing them to vote according to EPA's dictates under threat of harm to their constituents, and disturbing the independence of state legislators envisioned by the Constitution, are unnecessary infringements on the political rights of legislators in their representative capacities.

The political rights of citizens were also seriously infringed by the EPA action. An essential feature of American government is the notion that elected officials are ultimately responsible to the people. From the citizens' point of view, the foremost constitutional embodiment of the right to participate in governmental decision-

making is the right to petition the government for redress of grievances. The right also flows from the first amendment freedom of expression. Both of these rights are based upon the need for citizen input into the marketplace of ideas in order to maintain a free society. *Stromberg v. California*, 283 U.S. 359 (1931); *Bond v. Floyd*, 385 U.S. 116 (1966).

Affidavits in the Tenth Circuit record reveal that citizens represented by Mountain States Legal Foundation were told their lobbying and petitioning efforts regarding I/M legislation were futile because legislators had to vote in accordance with federal dictates. These citizens were denied their rights because EPA had rendered the state legislative process unable to respond to constituents.

The same structure of government requiring citizen input is also reflected in the guarantee of a republican form of government.[6] Such representation is impossible when the voices of the electorate are drowned out by the voice of a more powerful entity such as a federal agency. The state legislature is not free to exercise its perception of the will of the people, and thus its operations are no longer republican in nature. *See Duncan v. McCall*, 139 U.S. 449, 461 (1891).

The citizens and legislators of Colorado were deprived of their political rights when the EPA short-circuited the traditional political process and extorted compliance from the state legislature. Review by this Court is urgently necessary to protect these political rights in the context of national government coercion.

II. THE E.P.A. ADMINISTRATOR'S ACTIONS EXCEEDED HIS AUTHORITY UNDER THE CLEAN AIR ACT.

In addition to the constitutional infirmities identified above, the petitioners allege that EPA's threats and subsequent imposition of sanctions violated the Clean Air Act in four respects: (1) Many EPA duties under the Act (including federal promulgation of a plan) are triggered by disapproval of a state plan, and thus it is crucial to the

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[6]The petitioners seek to utilize the guaranty clause, not as an independent cause of action, but as an indication that the structure of the Constitution requires that state governments represent the state's electorate. *See, United States v. Harriss*, 347 U.S. 612 (1945) (employing "the American ideal of government by elected representatives" as a standard for evaluating first amendment claims). A political question is not raised in this instance. *See Baker v. Carr*, 369 U.S. 186 (1962).

statutory structure that EPA either approve or disapprove a state plan (or portions thereof). EPA's attempt to "conditionally approve" the Colorado SIP disguises a failure to perform statutory duties. Furhtermore, EPA used the device of conditional approval as an additional mechanism for placing coercive pressure on the state legislature and thereby upsetting the statutory balance between national and state authority. (2) The EPA has no authority to impose a ban on industrial construction. Sections 110 and 172 of the Act, 42 U.S.C. §§ 7410(a)(2)(I) and 7502(a)(1) (Supp. I 1977), discuss stationary source bans only as provisions of state plans and do not grant the EPA administrative power to impose a ban absent enabling authority in the SIP. (3) Withholding of highway funds under section 176(a) of the Act, 42 U.S.C. § 7506(a) (Supp. I 1977), is appropriate only when a state has not submitted a SIP. The statute does not contemplate using the severe sanction of withholding highway funds for altering a minor aspect of an otherwise satisfactory plan. (4) Similarly, the Administrator withheld sewage facility construction grants under circumstances not contemplated by section 316 of the Act, 42 U.S.C. § 7616 (Supp. I 1977). There is no blanket authority for the EPA to withhold sewage treatment funds based upon an aspect of the SIP unrelated to sewage treatment facilities and to the increased mobile and stationary source pollution resulting directly from new facilities.

Because the Clean Air Act divided responsibility between national and state governments, any action taken by the Administrator to expand federal control must be affirmatively set forth in the statute. *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945). The Administrator's actions exceeded the bounds of the national government role contemplated by the Clean Air Act. The Administrator has not met the burden of showing clear congressional authorization for his actions that interfere witn state autonomy.

III. THE COURT OF APPEALS ERRED IN DENYING PETITIONERS STANDING TO ASSERT THEIR RIGHTS UNDER THE CONSTITUTION AND THE CLEAN AIR ACT.

A. As a result of the EPA action, petitioners have suffered injury in fact in the form of economic harm and deprivation of their constitutional rights.

Petitioners have shown injury to their economic interests and constitutional rights, and have also based their claim of standing on the fact that they were directly regulated by the EPA action. They have alleged the type of interests sought to be protected by the Clean Air Act and by the constitutional provisions guaranteeing free speech, the right to petition the government, and a representative, federal form of government. The legislators and citizens herein have standing under the test established in *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), which requires a showing of: (1) Injury in fact and (2) an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

From an economic standpoint, the record reveals that the economy of Colorado would be injured by long-term withholding of funds resulting in lost jobs and income.[7] Citizens would be deprived of essential services. The continued unavailability of sewage treatment facilities could halt construction of new homes in part of the affected region and could adversely affect water quality. Affidavit of Ira Hardin, Motion for Expedited Review and Stay Pending Review, Exhibit E. The ban on new stationary sources would prevent construction of major industrial facilities within the nonattainment area (and even some facilities outside the nonattainment area, 44 Fed. Reg. 37679), thus hindering Colorado's economic development.

The evidence presented to the Tenth Circuit revealed injury to the members of Mountain States Legal Foundation not merely because of public expenditures in the ordinary sense, but also because each automobile owner would be required to pay an

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[7]One year of EPA sanctions was estimated to result in a loss of 25,000 jobs. Affidavit of Jay R. Lower, Motion for Expedited Review and Stay Pending Review, Exhibit C.

inspection fee of $10.00 and additional amounts up to $100.00 for repairs necessary to bring vehicles into compliance.[8] This mandatory fee for I/M constitutes a personal stake in the outcome of the litigation.

Of course, economic injury is not the only kind of injury that can support standing. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S 252 (1977); *United States v. SCRAP,* 412 U.S. 669 (1973). Serious violations of the constitutional rights of citizens and legislators have taken place as a result of the EPA action. Colorado legislators were specifically required to take action under the challenged EPA order. The order required that legislation be introduced and passed, that it contain specific provisions, that it amend aspects of prior legislation, and that the legislature act within a specified time frame. Appendix B at 40a. Obviously, this requirement has a strong impact upon individual legislators, particularly the legislative leadership, who were all petitioners in the instant litigation.

The legislator-petitioners have standing to challenge the EPA action because it directly affects their activities as legislators. Under the analysis adopted by the District of Columbia Court of Appeals in *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974), relying on *Coleman v. Miller,* 307 U.S. 433 (1939), a legislator's interest in protecting the effectiveness of his vote can be the basis for showing injury in fact. The court stated that "[n]o more essential interest could be asserted by a legislator" than vindicating the effectiveness of his vote. 511 F.2d at 436. In *Coleman, supra,* this Court found that state legislators had standing as aggrieved parties to challenge the procedure used in voting on a constitutional amendment. The Court noted that the standing of public officials was not dependent upon any showing of "private damage." 307 U.S. at 445. Standing of legislators must be premised upon some damage to them *as*

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[8]The estimated costs of $22.00 - $29.00 per car, based on the study commissioned by Colorado Senate Bill 1, were presented in the Reply Brief of Petitioners, Exhibit E. The fact that all proposed I/M legislation required payment of inspection fees by automobile owners was also presented by petitioners. Reply Brief of Petitioners 4. The I/M legislation as passed requires payment of an inspection fee of $10.00 per automobile. Colo. Rev. Stat. § 42-4-313(4)(a) and (b)(1973)(as amended by Senate Bill 52) provides that a licensed station shall charge a fee for performing adjustments required for issuance of a certification of emissions adjustment not to exceed $15.00. Model year 1981 or later automobiles may be required to expend up to $100.00 for repairs. Colo. Rev. Stat. § 42-4-312(1)(c)(1973)(as amended by Senate Bill 52).

legislators. Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); *Reuss v. Balles,* 584 F.2d 461 (D.C. Cir. 1978), *cert. denied* 439 U.S. 997 (1978). Such a showing has been made in this case.

The petitioners were injured by a direct interference with the legislative process. The entire purpose of EPA's threats to impose sanctions and subsequent actual imposition of sanctions was to force the passage of EPA-dictated legislation. The record contains a transcript of Colorado General Assembly debates with numerous statements by legislators that they were voting for the conference version of the I/M legislation only because of the EPA "blackmail." It is apparent from the record that EPA's form of I/M legislation would not have passed the Colorado legislature without imposition of sanctions. The legislators also expressed a desire to amend the legislation if EPA's ability to reimpose sanctions were halted, and amendment efforts appear likely to occur despite the risk of sanctions. Clearly, an actual and continuing interference with the Colorado legislative process has taken place, and petitioners have been injured in their capacity as legislators. Thus the legislator-petitioners have proper standing.

As discussed more fully in section I.B., *supra,* the deadlines imposed by EPA limited the time for legislative debate, thereby abridging the freedom of speech of legislators and limiting the citizens' right to petition the government.[9] The threat that sanctions would be imposed if legislators failed to follow EPA's dictates in enacting legislation had a chilling effect on legislative debate. Such a chilling effect also occurred through the utilization of federal government power to drown out the voices of the citizens.

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[9]Colo. Senate Bill 1 § 3, 1979, Colo. Sess. Laws 406, amending Colo. Revised Statutes 1973 to add § 42-4-306.5(5), was interpreted by EPA and the court of appeals to establish March 1, 1980, as a "self-imposed" deadline for legislative action. Appendix at 5a. This assertion misapprehends the import of the inclusion of the March 1 date in Senate Bill 1. Merely labelling the deadline as "self-imposed" does not resolve the crucial problems of EPA interference with state decisionmaking. The March 1, 1980, target date for future legislative action was selected "so that not less than ten months be available for the implementation of said sections [i.e., the implementation of an I/M program]." Senate Bill 1, § 3, 1979 Colo. Sess. Laws 406. The date had relevance only as an attempt to allow sufficient lead time for implementation of the program. It should be noted that the I/M program established under EPA's directives delayed the implementation one year until January 1, 1982. Obviously, the delay in the implementation date destroyed any necessity to begin work on implementation by March 1, 1980.

The Court's opinion is dangerously overbroad in stating that it is the exclusive power of the Attorney General to represent the state in all matters of public interest. The Court pronounces a rule that the Attorney General "is the exclusive legal representative of the state in all litigation with regard to matters of *public interest,* and he alone has the right to represent the state as to litigation involving a subject matter of *statewide interest.*" Appendix A at 28a (emphasis added). This pronouncement ignores statutory restrictions on the Colorado Attorney General's power and it fails to consider situations where individual rights might be integrally involved with matters of "public interest." Such a pronouncement precludes challenges to EPA actions by environmental groups because such issues would be of "statewide interest." The Court's pronouncement contains no limitation of the Attorney General's authority to matters of governmental interests, and thus may seriously infringe the right to vindicate individual claims and injuries.

The Tenth Circuit's ruling ignored the personal rights raised by petitioners. This Court should exercise its review power to prevent such a deprivation of rights and undue denial of a judicial hearing.

B. Petitioners have standing as aggrieved parties to seek judicial review under section 307 of the Clean Air Act.

The Clean Air Act contains two provisions for judicial review of EPA actions. Section 304, 42 U.S.C. § 7604 (Supp. I 1977), allows citizens, without any particular showing of injury, to challenge EPA failures to perform nondiscretionary duties. Similarly, Congress structured broad review of final agency action under section 307 of the Act, 42 U.S.C. § 7607 (Supp. I 1977). The first issue here is whether the congressional grant of standing is, as the Tenth Circuit ruled, limited to the State of Colorado itself to challenge an EPA ruling on the state implementation plan or whether citizens and legislators have standing. Secondly, even if the Tenth Circuit's reading of the Act to imply an "aggrieved party" showing is valid, the issue is presented whether the lower court erred as a matter of law by refusing to acknowledge that the EPA's demand for action by the legislature gave them standing as aggrieved parties.

The Tenth Circuit's opinion characterizes the State of Colorado as "the real party in interest" for purposes of challenging EPA action on the state implementation plan. Appendix A at 27a. Such a holding is entirely contrary to the long line of cases decided under the Clean Air Act. Environmental interests and regulated industries

have consistently been accorded standing to challenge SIPs. *See, e.g., Indiana and Michigan Electric Co. v. EPA,* 509 F.2d 839 (7th Cir. 1975); *Harley-Davidson Motor Co. v. EPA,* 598 F.2d 228 (D.C. Cir. 1979), and *Sharon Steel Corp. v. EPA,* 597 F.2d 377 (3rd Cir. 1979), allowing those within the zone of interests sought to be *regulated* by a statute to have equal standing with those within the zone of interests sought to be *protected* by a statute. The legislators are members of a body directly subject to the EPA's regulatory action, in the form of deadlines for introduction and passage of legislation.

Section 307 has provided a legitimate vehicle for many lawsuits filed by environmental groups for review of EPA actions, and their standing has been unchallenged. *See, e.g., Citizens to Save Spencer County v. EPA,* 600 F.2d 844 (D.C. Cir. 1979); *ASARCO, Inc. v. EPA,* 578 F.2d 319 (D.C. Cir. 1978); *Friends of the Earth v. EPA,* 499 F.2d 1118 (2d Cir. 1974); *NRDC v. EPA,* 489 F.2d 390 (5th Cir. 1974); *NRDC v. EPA,* 483 F.2d 690 (8th Cir. 1973). Even more expansively, actions have been maintained by entities only indirectly affected by the Clean Air Act. *See, e.g., McCoy-Elkhorn Coal Corp. v. EPA,* 622 F.2d 260 (6th Cir. 1980) (coal company had standing to challenge a portion of Clean Air Act as unconstitutional because it diminished the Company's market); *South Terminal Corp. v. EPA,* 504 F.2d 646 (1st Cir. 1974) (various oil companies, retailers, and parking companies brought suit to challenge regional air quality transportation control plan which limited the number of parking spaces in the city of Boston).

Since EPA actions on SIPs, including the Colorado plan, often contain provisions affecting the interests of specific individuals or groups, it would be unfair to limit standing to the state. "The state" is an amorphous entity without the sensitivity to violation of individual rights that would be afforded by allowing the affected individuals to sue. American jurisprudence is based upon litigation of rights by affected individuals; it has not often set up governmental entities as the sole defenders of rights and rendered individuals entirely unable to litigate their claims. Certainly this approach would not be satisfactory where, as in the Clean Air Act, Congress has specifically encouraged public input.

To limit standing to challenge EPA actions on SIPs to state goverments would prevent suits raising purely environmental concerns as well as those raising other constitutional and statutory infractions. The Tenth Circuit's decision, as applied to this case, effectively renders standing under section 307 of the Clean Air Act

(which contains no language restricting standing) more restricted than standing under the Administrative Procedure Act (which permits review by a person "adversely affected or aggrieved"). 5 U.S.C. § 702 (1976).

C. Petitioners have shown standing to assert violations of their constitutional rights and thus may address all issues properly before the Court.

As demonstrated by the preceding sections, petitioners have sustained injury in fact as a result of the EPA's actions. They have shown that their interests lie within the scope of the constitutional guarantees discussed herein and that their regulation by the EPA under authority of the Clean Air Act brings them within the scope of interests protected under the Act. Petitioners are entitled to pursue these interests in the courts.

This Court has not clearly decided the issue of standing to challenge tenth amendment violations. The question was specifically left open in *National League of Cities v. Usery,* 426 U.S. 833, 836n.7 (1976). The issue of state sovereignty was properly an issue in this litigation, and was fully briefed in an adversary manner by all petitioners. Although the Colorado Attorney General did not forcefully argue for protection of state sovereignty, the issue was raised and a tenth amendment violation was asserted by the Attorney General. Mountain States Legal Foundation and the legislators did not exceed their role in this litigation by arguing that the EPA had infringed upon the powers reserved to the states under the tenth amendment. As explained earlier, these parties established standing under section 307 of the Clean Air Act, and thereby are able to assert the broader public issues. This Court stated the basic rule in *Sierra Club v. Morton,* 405 U.S. 727, 737 (1972):

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

Accord, Warth v. Seldin, 422 U.S. 490, 501 (1975); *Scripps-Howard Radio v. Federal Communications Commission,* 316 U.S. 4, 14-15 (1942); *Sierra Club v. Adams,* 578 F.2d 389 (D.C. Cir. 1978).

Whether or not petitioners are accorded standing to argue violations of state sovereignty, the Tenth Circuit committed a serious error by failing to accord petitioners standing to protect their first amendment and other personal constitutional rights.

CONCLUSION

For the above reasons, petitioners submit that the Tenth Circuit erred in its determination that petitioners, as legislators and citizens of Colorado whose rights were violated, lacked standing to assert the statutory and constitutional infirmities of the EPA action. A multiplicity of constitutional rights of Colorado legislators and citizens have been violated by the EPA and, if the Clean Air Act is interpreted to authorize the EPA's actions, the Act should be declared unconstitutional. Vital issues about the future of federalism in America are presented by petitioners, and the EPA actions herein present a uniquely egregious violation of the principles of federalism. The balancing of powers necessary for a continuation of the federal system requires guidance from this Court.

Petitioners urge this Court to issue a writ of certiorari to reverse the Tenth Circuit's denial of standing and to resolve the merits of this lawsuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MOUNTAIN STATES LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	No. 79-2261
DOUGLAS M. COSTLE, et al.,	)	
Respondents.	)	
STATE OF COLORADO ex rel. J. D. MACFARLANE, Petitioner-Intervenor.	)	

ON PETITION TO REVIEW ACTION OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

[AUGUST 29, 1980]

James G. Watt and Gale A. Norton, Mountain States Legal Foundation, Denver, Colorado (James W. Sanderson of Saunders, Snyder, Ross & Dickson, Denver, Colorado, with them on the brief), for Petitioner.

Donald W. Stever, Jr., Attorney, Department of Justice, Washington, D.C. (James W. Moorman, Assistant Attorney General, and Angus Macbeth, Deputy Assistant Attorney General, Washington, D.C., Barbara H. Brandon, Kenneth A. Reich and

Jose Allen, Attorneys, Department of Justice, Washington, D.C., with him on the brief) (Michele Beigel Corash, General Counsel, and Bruce Diamond, James N. Cahan and Eric Smith, Attorneys, Environmental Protection Agency, Washington, D.C., Christine Shaver, Attorney, Environmental Protection Agency, Denver, Colorado, of Counsel), for Respondents.

Janice L. Burnett, Assistant Attorney General, Natural Resources Section, the State of Colorado (J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Solicitor General, and Lawrence A. DeClaire, Assistant Attorney General, Natural Resources Section, the State of Colorado, with her on the brief), Denver, Colorado, for Intervenor.

Jackson B. Battle, Robert J. Golten and Robert F. Wiggington, Boulder, Colorado, filed an amicus curiae brief for National Wildlife Federation.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

Mountain States Legal Foundation, hereinafter referred to as Mountain States[1], twenty-seven (27) named members of the Senate and House of Representatives of the State of Colorado in their respective official capacities as individually elected legislators of the State of Colorado, and the State of Colorado *ex. rel.* Mountain States, hereinafter jointly referred to as Mountain States, et al., or petitioners, filed a petition for review challenging the constitutional and statutory authorization of a final rulemaking decision of the federal Environmental Protection Agency (EPA) conditionally approving portions of the Colorado air quality control implementation plan. The petition, dated December 4, 1979, was filed pursuant to the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and rule 15 of Fed. R. App. Proc., 28 U.S.C.A. The State of Colorado, *ex rel.* J. D. McFarlane, Attorney General, intervened.

BACKGROUND

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), involves a complex web of exclusive jurisdiction governing review of various actions of the Administrator of EPA. Decisions handed down prior and subsequent to the 1977 amendments to the Act make it clear that exclusive jurisdiction for review of regulations or actions of the Administrator of EPA vests in the courts of appeals. *Anaconda Company v. Ruckelshaus,* 482 F.2d 1301 (10th Cir. 1973); *U. S. Steel Corp. v. U. S. Environmental Protection Agency,* 595 F.2d 207 (5th Cir. 1979); *Lubrizol Corp. v. Train,* 547 F.2d 310 (6th Cir. 1976).

The Clean Air Act creates a complicated statutory framework. The responsibility for plans to clean up the air is divided between the federal and state governments. The Act requires the EPA Administrator to establish ambient air quality standards for various pollutants. 42 U.S.C. § 7409. Each state governor is then required to submit a state implementation plan (SIP) designed to accomplish these standards. 42 U.S.C. § 7410. The EPA Administrator thereafter either approves or disapproves the SIP. 42 U.S.C. § 7410(a)(2)(A) through (K). Thus, the Congress clearly intended the final decision to be that of the EPA. *See* 42 U.S.C. §§ 1857(a)(2)(b), 1857c-5, 1857c-6; 42 U.S.C. §§ 7410(a)(2)(I); 7413(a)(5); 7502(a)(1). *See also:* 42 U.S.C. § 7411(d)(1)(2), (A) and (B); 7412(d), (1) and (2).

If a state fails to promulgate an acceptable plan, the Act requires that the EPA Administrator formulate and promulgate a federal plan for the governing area. 42 U.S.C. § 7410(c). The 1972 Colorado SIP submitted by the Governor met the approval of the EPA Administrator. 40 C.F.R. § 52.320, *et seq.* However, the 1972 Colorado SIP was required to be revised by virtue of 1977 amendments to the Act dealing with "nonattainment areas", i.e., air quality control regions that fail to meet air quality standards. 42 U.S.C. §§ 7501-7508. States with "nonattainment areas", such as Colorado, were required to submit revised SIPs by January 1, 1979; further, if a state appeared to be unable to meet air quality control standards by December 31, 1982, an additional requirement is imposed by the Act: The implementation of an automobile emission inspection and maintenance (I/M) program. 42 U.S.C. § 7502(b)(11)(B). In the event of a state's failure to comply, the EPA contends it is empowered to ban new construction in nonattain-

ment areas pursuant to 42 U.S.C. § 7410(a)(2)(I), and to withhold federal grants pursuant to 42 U.S.C. §§ 7506(a) and 7616(b).

The EPA's Final Rulemaking on Approval of the Colorado SIP, 44 Fed. Reg. 57401 (October 5, 1979), amended 40 C.F.R. part 52, so as to approve *in part* the revised Colorado SIP mandated by the nonattainment provision of the Clean Air Act. The revised SIP was submitted to EPA by the State on January 2, 1979. EPA published a notice of proposed rulemaking on May 11, 1979. *See* 44 Fed. Reg. 27691. The final rulemaking notice included four different types of dispositions as to various portions of the SIP: Approval, conditional approval, disapproval, and no final action. The instant case particularly relates to the attainment of the ambient air quality standards for ozone and carbon monoxide in "nonattainment areas" where EPA required I/M programs. These areas included portions of Larimer, Weld, Adams, Arapahoe and El Paso Counties, and the Counties of Denver, Boulder, Douglas and Jefferson.

The EPA contended that Colorado Senate Bill 1, establishing an I/M program to begin on January 1, 1981, and commissioning a study of the effectiveness of various I/M-type programs, was not "adequate enabling authority." Accordingly, the legislation did not receive complete EPA approval. The Administrator found that the legislation was deficient in several respects: (1) the legislature retained the right to approve I/M standards before they were to go into effect; (2) the bill contained no provision for retest after maintenance; (3) its appropriateness for 1981 and later model vehicles was questioned; (4) it lacked schedules for implementation of various administrative elements of the program; (5) the bill needed provisions for recordkeeping; (6) there were no demonstrated commitments to reduce emissions by at least 25% or to implement and enforce the program; and (7) the bill did not provide for unannounced inspection of facilities. 44 Fed. Reg. 57404-05. As a result of these alleged deficiencies, EPA ruled: "It is clear, however, that the program passed by the legislature does not meet the requirements of the Clean Air Act and additional action by the legislature is essential." 44 Fed. Reg. 57405. The EPA Final Rulemaking of October 5, 1979, set forth a timetable for the Colorado state legislature and Governor to follow as a basis for achieving full approval:

January 1, 1980 - Senate Bill 1 study to be completed and submitted to legislature.

January 12, 1980- I/M program to be included on list

of Governor's Call Items for the 1980 legislative session.

February 1, 1980 - Study results in the form of a draft final report to be submitted to legislature.

February 1, 1980 - Bill introduced in the legislature - copy submitted to EPA.

March 1, 1980 - Submission to EPA of legislation signed into law by the Governor, as well as schedules (milestones, dates, responsible agency) to implement the I/M program and corrections to other noted deficiencies.

44 Fed. Reg. 57405 (1979).

We here observe that the March 1, 1980, "deadline" above referred to was in fact the creation of the Colorado General Assembly, by virtue of its passage of Senate Bill 1 in June of 1979 which provided, *inter alia:* "The general assembly shall. . . take legislative action thereon, if any, not later than March 1, 1980. . ." C.R.S. 1973, 42-4-306.5(5). The deadline was self-imposed by the Colorado legislature.

The Administrator's mandate was followed by a listing of the consequences of noncompliance, including imposition of the sanctions contained in §§ 176(a) and 316(b) of the Act, 42 U.S.C. §§ 7506(a) and 7616(b), and a prohibition on construction of certain new major facilities in nonattainment areas, 42 U.S.C. § 7410(a)(2)(I). 44 Fed. Reg. 38471 (July 2, 1979). The Administrator emphasized the effect of noncompliance: "Due to potentially severe impacts resulting from the imposition of sanctions, it is vital that the effects be well understood." 44 Fed. Reg. 57408. Among the Administrator's "examples" of affected projects were planning and research grants, sewage treatment grants totaling $132 million (itemized by project), and an unspecified amount of federal highway funds. The EPA further warned that if it appeared that the state would not meet EPA's schedule, the imposition of sanctions would be accelerated. 44 Fed. Reg. 57408. These "admonishments" were made by EPA Regional Administrator Roger L. Williams following his meeting on February 28, 1980, with leadership of the Colorado General Assembly during which time the leadership expressed no hope that its own March 1, 1980, deadline would be met and that there was little prospect for the passage of an acceptable I/M program before the end of the legislative session.

On March 1, 1980, EPA notified this Court of its intention to disapprove the carbon monoxide and ozone portions of the Colorado SIP and that it would impose the Section 110(a)(2)(I) moratorium on construction of new major or modified stationary sources of these pollutants in the affected nonattainment areas pursuant to authority it claimed under 42 U.S.C. 7410(a)(2)(I). At that time, EPA would also begin to exercise its authority under Sections 176(a) and 316(b) of the Clean Air Act, 42 U.S.C. 7506(a) and 7616(b), to limit federal funds.

The Mountain States petition for review challenges (a) the EPA withholding of federal funds under the Clean Air Act and imposition of a stationary source ban as coercive action designed to achieve specific state legislative action, (b) the EPA Administrator's action under the Clean Air Act of "conditionally approving" or disapproving the SIP, (c) the actions of the EPA Administrator under the Clean Air Act in requiring the Colorado General Assembly to pass legislation meeting EPA criteria and an EPA timetable, and (d) the various actions of the EPA Administrator in violation of the Administrative Procedure Act, the Tenth Amendment, the First Amendment, the Fifth Amendment and Article IV, Section 4 (guarantee of a republican form of government) of the United States Constitution.

The State of Colorado, by and through its Attorney General, as Intervenor, filed a brief in direct, absolute conflict with the contentions raised by Mountain States. The State contended: (a) the EPA Administrator had not exceeded his statutory authority in conditionally approving the Colorado SIP, (b) the actions proposed by EPA pursuant to the Clean Air Act, §§ 176(a), 316 and 110(a)(2)(I), do not violate the Tenth Amendment, (c) EPA's conditional approval does not infringe on First Amendment rights to freedom of speech and to petition the government for redress of grievances, (d) due process of law has not been violated, (e) EPA's conditional approval of the Colorado SIP does not abridge the guarantee of a republican form of government, and (f) Mountain States lacks standing to represent the State of Colorado in an *ex relatione* capacity.

Proceedings for Stay Pending Review

Following the filing of the aforesaid Petition for Review, Mountain States, et al., filed a Motion for Stay pending this Court's review. The matter was briefed and argued before this Court,

following proper notice.

On March 13, 1980, this Court entered its Order granting injunctive relief staying enforcement by the EPA of any and all sanctions to and including May 1, 1980. We further ordered the Petition for Review submitted. In relation to the May 1, 1980, deadline, the Court observes that in the course of oral arguments presented on March 13, 1980, the State of Colorado, by and through the Colorado Attorney General, represented that it was likely that the Colorado General Assembly would enact legislation adopting an I/M program acceptable to EPA on or about May 1, 1980. The Attorney General expressly disclaimed any agreement with the constitutional and statutory challenges raised by Mountain States, et al., in their Petition for Review. In fact, the Attorney General acknowledged that he *did not* share the views expressed by Mountain States, et al., in challenging the constitutionality of the Clean Air Act and/or the actions taken by EPA *preceding EPA's imposition of sanctions*. The Attorney General's sole argument before this Court was that the action of the EPA in imposing the funding withholding sanctions prior to final adjournment of the 1980 session of the Colorado General Assembly would be arbitrary and capricious action because the General Assembly was making reasonable efforts to cure the deficiencies.

On May 2, 1980, this Court's injunctive order expired. On that date the Administrator of EPA imposed the funding and construction sanctions. On May 7, 1980, the Colorado legislature adopted I/M legislation, signed into law by Governor Lamm on May 23, 1980. EPA informed this Court on May 15, 1980, that it tentatively believed the legislation to be adequate under the Clean Air Act and had submitted for publication in the Federal Register a notice proposing approval of I/M legislation as part of the SIP. It was in this setting that this Court, on May 29, 1980, upon its own motion, ordered the parties to file memoranda by June 9, 1980, "showing cause, if any there be, why the appeal should not be dismissed for mootness."

In response to this Court's "mootness" order, the parties have responded as follows:

(1) The Colorado Attorney General took no position on the matter. His position is unexplained.

(2) EPA urged that the Court dismiss the action as moot. EPA points out that while, strictly speaking, the case will be moot only after EPA has taken the final action to approve the I/M legislation as part of the State Implementation Plan following the notice of

rulemaking and the comments which may be submitted, the Agency will act promptly, and anticipates lifting all sanctions so that no action will be taken under §§ 176(a) and 316. EPA contends that under Article III of the United States Constitution the jurisdiction of federal courts is limited to those suits presenting a "live controversy" at the time the court reviews the case, citing to *Sosna v. Iowa*, 419 U.S. 393 (1975) and *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and that this requirement precludes Article III courts from issuing advisory opinions which cannot affect the rights of the parties in the case before them, citing to *North Carolina v. Rice*, 404 U.S. 244 (1971) and *Oil Workers Unions v. Missouri*, 361 U.S. 363 (1960). EPA also relies on the recent decision of *County of Los Angeles v. Davis*, ____ U.S. ____, 59 L.Ed.2d 642 (1979) for the proposition that a case is moot when the issues are no longer live or the parties lack a legally cognizable interest in the outcome and where there is no reasonable expectation that the alleged violation will recur.

As to the contention that the legislators and citizens of Colorado must be protected from "coercion," EPA contends that since the Colorado legislature had acted, it no longer requires any "protection" from the alleged "coercion," and *thus if this Court should reach the merits, it would be merely advising the parties as to their constitutional right, should this issue ever arise in the future.* [Memo of EPA, June 10, 1980, pp. 5-6].

With reference to any contention that the matters presented are "capable of repetition yet evading review," thus coming within the exception to the mootness doctrine applied in *Weinstein v. Bradford*, 423 U.S. 147 (1975) and *Sosna v. Iowa, supra*, EPA argues that it cannot be demonstrated that the administrative order or action that expired will be repeated and that the new order will again evade review. EPA states that the alleged "coercion" could only occur again if the Colorado legislature either repeals its I/M legislation or fails to implement its provisions; further, that if such "speculative" events should come to pass, petitioners could again file suit after EPA imposes a construction moratorium or funding restrictions.

(3) Mountain States strongly argued that the issues are not moot, will not become moot, and demands judicial resolution. Mountain States contends:

> Senate Bill 52, enacting the EPA-dictated version of an inspection and maintenance program, was narrowly passed by the Colorado General Assembly. A shift of only two votes in the Senate would have defeated the

measure. Attached to this memorandum are affidavits [12 of State Senators and Representatives] and a transcript of debates . . . conclusively [demonstrating] that if the EPA sanctions had not been invoked, the legislation in its existing form, S.B. 52, would have been *overwhelmingly defeated* in both the Senate and House . . . Furthermore, if sanctions are lifted and the threat of reimposition is removed, the program will almost surely be modified. The direct and *continuing* effect of EPA's pressure tactics violates the rights of Colorado citizens . . . If the status of this case has been changed so that the Court considers the case moot, it is because the Court itself has allowed this to happen . . . The petitioners expected a decision [from this Court] by that time [May 1, 1980] . . . The legislature passed legislation only after the Court had refused to prevent EPA from blackmailing the legislature and only after sanctions had actually been imposed. When this lawsuit was initiated, petitioners contended that the threatened sanctions had a chilling impact upon the legislature. Since that time, the sanctions have become a reality, and their ability to control legislative action has been proven . . . To date this Court has chosen to step aside and allow EPA to intrude into the functions constitutionally given to the Colorado government . . . Ruling that this case is moot will have severely negative public policy implications. Legislators must not be required to sacrifice the state budget and allow irreparable damage to the state economy in order to have their rights judicially clarified. Declaring the issue of this case [the preservation of the constitutional form of government in America] to be moot would be an unfair and irresponsible act that should not be tolerated by this Court or the Supreme Court of the United States.

[Memorandum of Mountain States, filed June 9, 1980, pp. 1-6].

THE THRESHOLD ISSUE OF STANDING

EPA has consistently contended that petitioners, Mountain States, et al. ". . . lack standing to assert any constitutional

arguments on behalf of the State of Colorado . . . for review since only the state has standing to make those arguments. The state, moreover, has epxressly opposed petitioners' arguments; therefore, there is no case or controversy with respect to these arguments." [Brief of EPA, p. 28]. EPA, citing to those "standing" requirements articulated in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975) and *O'Shea v. Littleton*, 414 U.S. 488 (1974), argues, *inter alia:*

> One of the "prudential concerns" recognized by the Supreme Court is that one party should not be permitted to rest his claim to relief on the rights of another who does not press those rights. *Duke Power Company, supra,* at 80. The rationale for this limitation was expressed by the Court as follows:
>
> > There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated — the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.
>
> Neither petitioner, Mountain States Legal Foundation, nor the individual petitioner-legislators, has alleged a sufficient "personal stake" in this controversy to entitle it to raise constitutional arguments on behalf of the State of Colorado.[2] / Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment. Here, the State of Colorado has intervened in this case and has directly opposed each of petitioners' constitutional and statutory arguments.
>
> Hence, the one party with clear standing to raise the constitutional arguments made by petitioners not only declined to make those arguments but expressly rejected them. *Therefore, this case presents no justiciable case or controversy with regard to the constitutional arguments raised here and the court need not address them. Duke Power Company, supra.* [Emphasis supplied].

> Moreover, the state attacks Mountain States' standing to raise constitutional claims on the state's behalf; respondents adopt the state's reasoning. Brief for Colorado, at 30-34. EPA and the state both rely on this Court's decision in *Gallagher v. Continental Ins. Co.*, 502 F.2d 827 (10th Cir. 1974), as authority for the proposition that Mountain States lacks standing to raise claims belonging to the state. There the court held that a group of citizens and taxpayers lacked standing to recover (on behalf of the state of Colorado) alleged overpayments made in connection with a highway project.
>
> * * *
>
> Although the state did not challenge the standing of the individual petitioner legislators herein, they have no better claim to standing than Mountain States, under *Gallagher,* the other authorities cited in the state's brief, and the principles discussed above, apply with equal force to the legislators' standing [sic].
>
> Even if state law permitted the petitioner legislators to press the state's constitutional claims, the "prudential concerns" recognized by the Supreme Court in *Duke Power, Co., supra,* dictate that this court should not allow the legislators (or Mountain States) standing to raise claims that the state itself declines to raise and in fact opposes.
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> [Brief of EPA, pp. 29-31].

In addition, EPA contends that no "case or controversy" exists entitling the State of Colorado, as Intervenor, to an advisory opinion. EPA points out that the State of Colorado, through its Attorney General, has taken a position directly contra to that of Petitioners, and accordingly:

> Colorado contends that, as far as it is concerned, EPA has not unlawfully trenched upon the state's sovereign rights. Notwithstanding this contention, it urges this court to "set forth the standards according to which EPA must adhere in implementing the sanctions' provisions of the Clean Air Act." Colorado's Brief at 17. Colorado

makes this request out of its concern that the federal agencies, because of their "tremendous powers" and the states' concomitant dependence on continued receipt of federal funding, might, at some unspecified time in the future, unlawfully invade Colorado's sovereign rights; and, although the state steadfastly maintains the EPA has not yet done so, it apparently believes that the mere *potential* for future unlawful action by EPA is sufficient justification for this court to sketch the constitutional boundaries of EPA's authority under the Clean Air Act. *See* Brief for Colorado at 9-11, 16 and 17.

The lack of a dispute with regard to the Tenth Amendment issues between the federal government and the only party with standing to raise these issues — the State of Colorado — deprives this case of the indispensable Article III "case or controversy" which is the predicate for the exercise of federal judicial power, and consequently short-circuits further consideration by this court of all Tenth Amendment claims. Therefore, whatever the depths of Colorado's concerns with regard to the potential abuse of power by EPA or other federal agencies, those concerns cannot vest this court with jurisdiction to render an advisory opinion.

* * *

In conclusion there is no case or controversy here because Colorado contends that the Clean Air Act passes constitutional muster under the Tenth Amendment and the petitioners lack standing to raise any contrary Tenth Amendment claims. Thus any decision on these issues would be purely advisory and beyond the judicial power of this court under Article III.

[Brief of EPA, pp. 33-35].

The State of Colorado, by and through its Attorney General, contends that Mountain States is without standing to represent the sovereign interest of the State of Colorado in an *ex relatione* capacity:

. . . [A]n action concerning matters of general public

welfare is appropriately instituted in the name of the attorney general or in the name of the state ex rel. attorney general. See, *e.g., State ex rel. Taylor v. Lord,* 28 Or. 498, 43 P. 421 (1896); *Coco v. Oden,* 143 La. 718, 79 So. 287 (1918); *State ex rel. Attorney General v. Cunningham,* 81 Wisc. 440, 51 N.W. 724 (1892); *United States v. Throckmorton,* 98 U.S. 61, 70 (1878).

C.R.S. 1973, 24-31-101 *et seq.* provides that the attorney general shall appear for the state in all actions:

> In which the state is a party or is interested when required to do so by the governor.

C.R.S. 1973, 24-31-101(1)(a). In this case, by executive order No. D0030-74 the Governor ordered the attorney general to intervene in this action to represent the interests of the state. (See attached exhibit C.)

Unless a statute provides otherwise, the attorney general has the exclusive right to represent the state in actions to enforce its interests. *State Board of Pharmacy v. Hallett,* 88 Colo. 331, 296 P. 540 (1937). Colorado has passed no legislation authorizing a private person to represent the state in this or any other such action.

A similar issue arose in an action brought by citizens and taxpayers of Colorado seeking recovery of the amounts allegedly unlawfully disbursed in payment of work done on a tunnel construction project. This circuit held that these citizens had no standing to seek to recover these alleged overpayments on behalf of the State of Colorado. [*Gallagher v. Continental Insurance Co.,* 502 F.2d 827 (10th Cir. 1974)]. Characterizing the suit as a derivative action on behalf of the State of Colorado, this circuit found that there was no authority under the Colorado law for maintaining such an action.

* * *

Despite its clear lack of authority, petitioner Mountain States Legal Foundation may urge this court to imply authority for its actions from common law cases in

which private persons sought to act as relators. Petitioner's argument should be rejected.

The doctrine in Colorado at common law was that a private person could not, as a matter of right, bring an action for wrongs done to the public. Private persons could represent the people as a relator only where the injury, in addition to affecting the public, peculiarly affected them. *People ex rel. Byers v. Grand River Bridge Co.*, 13 Colo. 11, 21 P. 898 (1889); *People ex. rel. Jerome v. Regents of State University,* 24 Colo. 175 (1897); *People ex rel. v. Blake,* 128 Colo. 111, 260 P.2d 592 (1953).

The petition for judicial review, filed with this court on December 4, 1979 by petitioner, is utterly devoid of any allegations of fact attempting to demonstrate that Mountain States Legal Foundation has any special interest in this matter other than that of the general public. Thus, even under the common law test, Mountain States Legal Foundation has no standing to represent the state as a relator in this action. *McCamant v. Denver,* 31 Colo. App. 287, 501 P.2d 142 (1972).

Petitioners may also erroneously seek to premise their *ex relatione* status on Colo. R. Civ. P. 106, which provides that if the district attorney declines to bring an action under rule 106(a)(3) it may be brought upon the relation and complaint of any person. Rule[s] 106(a)(3), however, refers only to actions involving usurpation of office or franchise and is irrelevant to the situation herein.

Moreover, even if rule 106 or the common law provided a proper basis for authority for petitioner's attempt to attain *ex relatione* status, it should be noted that the state has not declined to become involved in this action but has intervened as a party. Petitioners may have serious standing problems concerning their right to raise the tenth amendment issue (see respondent's memorandum in opposition to petitioner's motion for stay pending review, pp. 25-28). This does not give them the

> right to bootstrap themselves, however, into a position whereby, without any authority whatsoever, they purport to represent the state and thus obtain standing to raise issues they would otherwise be unable to raise. See *Gallagher v. Continental Insurance Co., supra.*
>
> [Brief of Intervenor, pp. 30-34).

Mountain States did not specifically address the "standing" issue, apparently of the view that the challenge is without substance. Contending that "this controversy" calls upon the court to make a major decision regarding the future relationship of the national and state governments [Brief of Petitioners, p. 13], Mountain States urges that the EPA Administrator's action be invalidated under the Administrative Procedure Act, 5 U.S.C. §706, and that, in addition, relevant portions of the Clean Air Act be declared unconstitutional. Relying heavily on *National League of Cities v. Usery,* 426 U.S. 833 (1976), Mountain States argues that the essence of that decision ". . . is that courts must determine whether the national government has exercised its commerce power authority in a manner that *'displaces'* state decisionmaking regarding an integral state government function. This involves a determination of (1) whether an integral function is involved and (2) whether state decisionmaking has been displaced. If both of these factors are present, then the action of the national government is unconstitutional as violative of the tenth amendment." [Brief of Petitioners, p. 15]. [Footnote omitted].

Mountain States, et al., contends that in this case EPA is attempting to interfere in one of the most essential state functions — lawmaking — by imposing severe and unncessary sanctions against the states, the result of which is to shift decisionmaking from the state to the national government and to destroy the state's autonomy. After recounting the severe impact of the threatened sanctions, i.e., halt to various projects, loss of jobs, serious financial difficulties for local governments, Mountain States concludes: "In short, the EPA sanctions threaten economic havoc for the state, its political subdivisions, and its people. It is difficult to imagine that the state government could compensate for the loss of federal funds or that the economy could adjust to such a setback. Consequently, it is likely that citizens of Colorado would be deprived of essential services." [Brief of Petitioners, p. 10].

General Principles of Standing

The critical, principal question here is whether *any* of the petitioners qualify as "aggrieved" persons entitled to judicial review of final agency action, or whether the petitioners have presented a *sufficient* "case or controversy" to import justiciability between the petitioners and the respondent within the meaning of Article III of the United States Constitution.

The question of standing involves "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). In *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59 (1978), the Supreme Court recognized "injury in fact" as the one constant element in judicial statements concerning standing:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261 (1977).
>
> 438 U.S. at p. 72.

"Injury in fact" means concrete and certain harm. It may be the out-of-pocket costs to a business resulting from obedience to a new governmental rule, *Hunt v. Washington Apple Advertising Comm'r.,* 432 U.S. 333 (1977), or the unwanted result of a government rule whether or not a pecuniary loss is sustained. *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977). Even so, in the absence of a specific statutory grant of a right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street. *United States v. Richardson,* 418 U.S. 166 (1974). Thus, in *National Collegiate Athletic*

Association v. Califano, ____F.2d____ (No. 78-1632, 10th Cir., April 17, 1980) we held that a plaintiff has standing if he is "injured in fact" by the defendant's conduct and that the "injury in fact" must constitute concrete and certain harm.

It is well established that judicial review of final agency action by an "aggrieved" person will not be denied unless there is a persuasive reason to believe that such was the purpose of Congress. *Morris v. Gressette,* 432 U.S. 491 (1977). A party must clearly demonstrate by facts alleged that "he himself adversely affected" or those he represents have been "injured in fact" by the agency's conduct. *Sierra Club v. Morton,* 405 U.S. 727 (1972); *Data Processing Service v. Camp,* 397 U.S. 150 (1970).

Standing in Relation to Pertinent Statutory Provisions of the Clean Air Act And a Colorado Statute

It is necessary in cases involving "standing" contentions to concentrate on the specific statutory framework from which the challenges have their origin in order to place the issue in proper focus. Thus, in the case at bar, we must first analyze the Clean Air Act in its pertinent parts together with any relevant Colorado statutes.

The [EPA] Administrator is directed to ". . . cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program . . . [in conjunction with] . . . cooperative activities by the States and local governments for the prevention and control of air pollution . . ." 42 U.S.C. § 7402(b) and (a). "Each *State* shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air qualtiy standards will be achieved and maintained within each air quality control region in such State." 42 U.S.C. § 7407(a) [emphasis supplied]. The Administrator is directed to make various determinations relative to a State plan which, by the language of the statute must include "the comprehensive measures and requirements" to be approved by the Administrator with an "attainment" date not later than December 31, 1982. 42 U.S.C. § 7410. Should there exist any "nonattainment areas" within a State from and after

June 30, 1979, in which construction or modification is not then being pursued, the Administrator contends that he is directed to terminate construction of any major stationary source under 42 U.S.C § 7410(a)(2)(I), and to withhold certain federal assistance funds from the affected "nonattainment areas," if the Governor of the affected state has not submitted an implementation plan which considers the required elements enumerated in 42 U.S.C. § 7502 or if reasonable efforts toward such submission are not being made after July 1, 1979. 42 U.S.C. §§ 7506(a)(3) and 7616(b)(2). Thus, the Congress expressly authorized the sanctions imposed in this case; furthermore, it is ludicrous to imagine that the Congress did not understand the significance of the economic impact of the funding restrictions it directed.

Significantly, the Act deals with compliance requirements beyond state plans and provides for private penalties. The Act mandates exclusive review in the courts of appeals governing the grant or denial of waivers to companies unable to comply with applicable standards, 42 U.S.C. §§ 7411(j), 7412(c), 7413(d) and 7419 and establishes a procedure empowering the Administrator to impose noncompliance penalties against the affected party following notice and hearing. 42 U.S.C. § 7420. In terms of "citizen suits," they are, in our view, clearly authorized by direct proceedings in the district courts under 42 U.S.C. §§ 7604 when the EPA Administrator is charged *with failure to perform a non-discretionary duty. See* 38 ALR Fed. 578. In our view, Congress thus restricted citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act. *Anaconda Co. v. Ruchelshaus,* 482 F.2d 1301 (10th Cir. 1973).

The EPA Administrator's Final Rulemaking on Approval of the Colorado SIP of October 5, 1979, challenged here, was solely and exclusively directed to the State Plan. The 1977 amendment to the Clean Air Act required that a specific schedule be adopted to establish the inspection/maintenance (I/M) program, as "expeditiously as possible." To be acceptable, an I/M program must achieve the required 25% reduction in both hydrocarbon and carbon monoxide exhaust emissions by 1987. It was in this setting that the EPA Administrator on March 14, 1980, published a final rule, 45 F.R. 16486, disapproving the carbon monoxide and ozone portions of the Colorado State Implementation Plan, invoking the restrictions on construction of major new or modified stationary sources and announcing that it would begin withholding certain financial assistance form the affected "nonattainment areas."

We have heretofore observed that the State of Colorado, by and through its Attorney General, has *in fact* intervened in this case. The position of the State of Colorado is completely in contradiction to that of Mountain States and the twenty-seven members of the Colorado General Assembly on the constitutional and statutory challenges raised by the petitioners. *The sole contention raised by the State of Colorado was that the imposition of the sanctions by the EPA Administrator prior to final adjournment of the 1980 session of the Colorado General Assembly would constitute arbitrary and capricious action by the EPA.* Thus, the State of Colorado, by and through its chief legal officer, the Attorney General, has elected to disassociate itself with the *contentions raised by petitioners herein involving constitutional and statutory challenges to EPA's actions taken or threatened.* We observe that this posture is one which, at all times, must necessarily have been known to all state officials and to the officers and members of Mountain States. Even so, there is nothing whatsoever in this record indicating that (a) the Governor of Colorado at any time directed the Attorney General to raise the challenges presented here by petitioners, or (b) the General Assembly [or any one of the twenty-seven legislators who appear as petitioners here] requested the Attorney General to prosecute suit against the EPA, notwithstanding the provisions of C.R.S. 1973, 24-31-101(1)(a):

> The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch. He shall attend in person at the seat of government during the session of the general assembly and term of the supreme court *and shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.* [Emphasis supplied].

Attached to Intervenor's Brief as Exhibit "C," is a copy of an Executive Order executed by Governor Richard D. Lamm, dated December 21, 1979, ordering the Attorney General to intervene in this lawsuit pursuant to C.R.S. 1973, 24-31-101(1)(a) as one in which "the State is interested." Intervention was granted on January

30, 1980.

One must necessarily ask: Who represents *the* State of Colorado? In light of the complete, unequivocable conflict in postions heretofore emphasized between petitioners and the State of Colorado, by and through the Attorney General, the issue must be addressed.

I.
Standing of Mountain States to Sue for Itself

We hold that Mountain States doe not have standing to sue in its own right. There is no showing that the challenged EPA actions will in anywise impair the functions and activities of Mountain States. There is no contention that Mountain States will suffer loss of membership, sustain financial loss or any other impairment as a result of the actions of the EPA, whether actually taken or threatened. Furthermore, Mountain States cannot satisfy the standing requirement contained in § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

We hold that Mountain States has not demonstrated that it has a sufficient "personal stake" in the outcome of the controversy to render itself, as an organization deeply interested in the problem, an "aggrieved person" with a demonstrated "legal wrong" or claimed invasion of a "legal right." *Unites States v. SCRAP,* 412 U.S. 669 (1973); *Sierra Club v. Morton, supra.* Notwithstanding the fact that Mountain States has advanced constitutional claims on behalf of its officers, members, supporters, and the State of Colorado, we conclude that Mountain States has nothing more than an indirect stake in the action. In *Sierra Club v. Morton, supra,* the matter was well articulated:

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at

> least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial processes.
>
> 405 U.S. at p. 740.

In *Natural Res. Def. Coun., Inc. v. United States Env. P. Agcy.*, 481 F.2d 116 (10th Cir. 1973), Judge Breitenstein, writing for this Court, noted that 42 U.S.C § 1857h-5(b)(1), which was the predecessor to § 7607(b)(1), simply provides that a petitioner seeking review of the EPA Administrator's action in approving or promulgating any implementation plan under § 1857c-5 of the Clean Air Act may do so by filing a petition in the appropriate United States Court of Appeals, without any requirement that the person or organization seeking review is a person "adversely affected or aggrieved" as required under 5 U.S.C. § 702. Notwithstanding the "blanket invitation to all the world to petition a court of appeals for review" under § 1857h-5(b)(1), we held that a party attacking agency action, whether it be in connection with rule making or after an adjudicatory type hearing, must have standing, which, under Article III, requires a showing of injury in fact bringing the party within the zone of interests protected by the Clean Air Act.

II.
Standing of Mountain States to Sue For Its Officers, Members and Supporters

We turn now to the question of whether Mountain States has standing to sue on behalf of its officers, members, and supporters who are citizens of and reside in the "nonattainment" areas of the State of Colorado affected by the EPA action, and those officers, members and supporters "in the remainder" of Colorado who are deprived of their constitutional and statutory rights.

We hold that there is nothing contained in this record showing that the officers, members and supporters of Mountain States have that necessary "personal stake" demonstrating injury in fact. The only resources they may have committed or advanced are those

representing membership fees or tax payments, the former constituting voluntary action unassociated with issues involved here, and the latter in a class common to all taxpayers generally. There is no showing that their activities within the Mountain States organization have been or will be affected in any manner as a result of the challenged EPA actions. There is nothing about the EPA action, including the sanctions, which can be considered compulsion by unwanted and unlawful government edict constituting injury *per se* traceable to the officers, members or supporters of Mountain States. There is no analogy here to that loss of accounts experienced by the apple dealers in *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333 (1977) or the inability of a builder to undertake a program of low-cost building in an area included in restrictive zoning ordinances, as set forth in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). In terms of the "legal wrongs" or "zones of interests" tests relative to standing to sue, under the Administrative Procedures Act, individuals, as officers, members and supporters of an organization, must demonstrate that the challenged statutes and/or regulations have some articulable "cause-and-effect" relation to an identifiable "injury" which, in fact, affects them:

> . . . Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' zoning practices, there is a substantial probability that they would have been able to purchase or lease . . . and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.
> *Warth v. Seldin*, 422 U.S. at p. 504.

The crux of petitioners' requested legal redress, as identified in the Petition for Review, is an order from this Court setting aside the actions of the Administrator of EPA on a variety of constitutional grounds essentially targeted at the threatened "punitive sanctions against the State of Colorado." Significantly, the Petition states that prior to filing said Petition, Mountain States dispatched a letter to Governor Lamm requesting him "to direct the Attorney General *to protect the interests of the State of Colorado*"; further, both formally and informally, specific requests were made of the Attorney General to "protect the sovereign interests of the State of Colorado from federal government intrusion into the internal affairs of the State" by filing the Petition for Review within the requisite time limit, to-wit, by December 4, 1979. The Petition states that because representatives of the Attorney General's office

stated that there was no present intention to challenge the Administrator's rulemaking order of October 5, 1979, ". . . Mountain States Legal Foundation takes it upon itself the responsibility to file this Petition *ex relatione* on behalf of the sovereign State of Colorado. *Should the Governor of the State of Colorado direct the Attorney General to represent the state's interest in this grave constitutional matter, the Mountain States . . . would eagerly welcome his involvement.*" The foregoing is, in our view, an implicit acknowledgment by petitioners that the challenges advanced *by them* are, in reality, [if accepted as true based on the pleadings contained in the Petition] challenges directly affecting the sovereign State of Colorado. As thus cast, these challenges could only be advanced here by the Attorney General. In fact, however, the Attorney General, in intervention, has refused to associate the interests of the State of Colorado with the challenges advanced by petitioners.

In *Gallagher v. Continental Insurance Company*, 502 F.2d 827 (10th Cir. 1974), this Court held that a group of citizens and taxpayers had no standing to recover, *on behalf of the State of Colorado*, alleged overpayments made in connection with a highway project. We there said:

> Plaintiffs urge that as state citizens and taxpayers they may sue for the recovery of unlawfully disbursed funds. Viewed in this light, the suit is a derivative action to assert state rights. Authority to bring a suit of that nature depends on state law. Colorado has no constitutional or statutory authorization for maintenance of derivative actions on behalf of the state. It has been held that absent statutory authorization citizens and taxpayers may not bring a derivative suit on behalf of the state. . . In some cases courts have implied such a right. . . In Colorado, the right would have to be implied. We agree with the district court that it is not "the province of the federal judiciary to fashion implied state rights of action." [Citations omitted].
>
> 502 F.2d at 832.

The issue of "standing" in a case very similar to the case at bar was before this court in *Natural Res. Def. Coun., Inc., v. United States Env. P. Agcy., supra.* There, the petitioners, although not asserting constitutional issues, did challenge the EPA Administrator's approval of portions of implementation plans submitted under the Clean Air Act by Colorado, New Mexico and Utah. We held that

the petitioners were without standing. The petitions for review were dismissed. We there said, in relevant part:

> We believe that the question is whether the party attacking agency action has standing, not whether the issue itself is justiciable. . . [F]actors [to be considered] are whether the attack on agency action is by a person within the zone of protected interests. . . .
>
> We come then to the effect of §1857h-5(b)(1). By permitting anyone in the world to petition for review of agency action without hindrance or limitation, Congress attempts to authorize private attorney generals to assert a public interest. If Art. III is not controlling, the question is the power of Congress to affect the Court imposed rule of self-restraint. We are helped by no decided cases. . . . Anything which we might say on the rights of private citizens to assert their ideologies in public actions would add little if anything to the literature on the subject.
>
> . . . We believe that any congressional authorization of suits by private attorney generals must be unequivocal and appropriate.
>
> . . . §1857h-5(b)(1) is not an appropriate authorization. . . . Unrestricted litigation by private persons to assert their own ideologies under a claim of public interest presents the potential of hazardous consequences to our constitutional system based as it is on the concept of separation of powers.
>
> . . . We believe that Art. III is controlling and that petitioners lack standing because they fail to state any injury in fact and hence do not present a case or controversy within the constitutional mandate. If we are wrong in this, we believe that petitioners have no standing because they have alleged nothing which brings them within the zone of interests protected by the Clean Air Act Amendments of 1970. If we are wrong in both of these conclusions. . . we believe that §1857h-5(b)(1) is ineffective to deny the exercise of judicial restraint in determination of standing in cases like these, and we choose to exercise that restraint.
>
> 481 F.2d at pp. 120-121.

We hold that Mountain States is without standing to seek judicial review on behalf of its officers, members and supporters.

III.

Standing of the Twenty-seven Named Members of the Colorado General Assembly to Sue

It is the contention of the named members of the Colorado General Assembly that ". . . EPA has entered a sensitive area by telling a state legislature to pass new legislation meeting certain specific requirements. . . The actions of the EPA — requiring passage of legislation and threatening sanctions against the state — have a serious chilling effect upon the legislators' freedom of speech. . . . Compelling an affirmative act of a political or ideological nature is not permitted by the first amendment. *Wooley v. Maynard*, 430 U.S. 705 (1977). . . . The national interest does not outweigh the first amendment interest in preserving the important right of legislators to vote according to the wishes of their constituents, not at the behest of another government agency." [Brief of Mountain States, pp. 33-34].

A private litigant, whether he be a legislator, a citizen or a taxpayer must, in order to have "standing" to sue, demonstrate a personal stake in the outcome, and demonstrate that he is the proper party to request adjudication of the particular issue. *Flast v. Cohen*, 392 U.S. 83 (1968). Federal courts do not have power to render advisory opinions. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

In *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir. 1971), this court held, *inter alia*, that the plaintiff, who filed a class action seeking a declaratory judgment that a federal statute constituted an usurpation of the police power reserved to the State of Colorado in violation of the Tenth Amendment, was without "standing." There Lamm (now Governor Lamm) sued individually as a citizen and taxpayer of the State of Colorado and of the United States, *and as a member of the Colorado legislature*. He contended, much in the manner of the twenty-seven legislators in the instant case, that 23 U.S.C. §131 was unconstitutional as violative of the Tenth Amendment. That provision was enacted as part of the 1965 Highway Beautification Act, which regulated outdoor advertising along federal-aid highways. *It provided that if the Secretary of Transportation decided that any State had not provided "effective control" of outdoor advertising along federal-aid highway systems, the total Federal-Aid Highway Allotment to that State would be reduced 10% per year* [estimated to be $6 million per year to

Colorado]. Lamm had introduced bills in the Colorado legislature, in reliance on the State's police power, which apparently would have declared the outdoor advertising adjacent to certain highways, including the federal-aid highway system, subject to destruction or abatement without compensation as injurious to public safety as a public nuisance. Lamm had contended that the "withholding" statute had, in effect, intimidated the Colorado Legislature and had prevented due consideration of his bills. We held that Lamm lacked standing to raise the Tenth Amendment challenge because he had not demonstrated that Congress, in enacting 23 U.S.C. §131, *supra,* had exceeded its taxing and spending power delegated to it by Article I, §8, and that Congress had not thereby invaded the legislative province reserved to the states by the Tenth Amendment. In dicta we observed:

> Here the power of regulation has not been preempted by the Congress. But that begs the point. The Congress has clearly determined that the "taking" of outdoor advertisements adjacent to federal-aid highways required "just compensation." The Tenth Amendment has been construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby,* 312 U.S. 100. . .(1941). And while the United States is "not concerned with, and has no power to regulate local political activities as such by state officials, it does have power to fix the terms upon which its money allotments to state shall be disbursed." *Oklahoma v. U.S. Civil Service Comm'n.,* 330 U.S. 127. . .(1947).

* * *

Following oral arguments, Lamm submitted "traditional cases" in further support of his standing contention. He cited *Allen v. Hickel,* 138 U.S. App. D.C. 31, 424 F.2d 944 (1970); *Protestants and Other Americans United for Separation of Church and State v. Watson,* 132 U.S. App. D.C. 329, 407 F.2d 1264 (1968); *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150. . .(1970); and *School Dist. of Abington Tp., Pa. v. Schempp,* 374 U.S. 203 . . .(1963). These decisions do not aid Lamm. In each

case the challenge to the taxing and spending power was anchored to an alleged constitutional provision restricting its exercise. The Tenth Amendment does not raise the challenge.
449 F.2d at pp. 1203-1205.

CONCLUSION

The constitutional issues of paramount concern to Mountain States, et al., relate to the rights of the State of Colorado and all of its citizens. They have been invoked by Mountain States, et al., in the context of a federal statute, the Clean Air Act, which requires particular action on the part of the State of Colorado (submission of a SIP which meets approval of the EPA Administrator) and which, if not approved, triggers imposition of sanctions *as a result of the failure of the State to submit a plan meeting EPA standards.* Thus, in truth, the State of Colorado is the real party in interest. C.R.S. 1973, 24-31-101(1)(a) provides that the Attorney General of the State of Colorado is to appear "for the state" in all actions, civil and criminal, in which the State "is a party or interested" when "required to do so by the governor." Here, the Attorney General was directed to intervene on behalf of the State of Colorado by Governor Lamm on the basis that "the State is interested." We must assume, of course, that the absolutely conflicting position posited by the Attorney General to the panoply of serious constitutional and statutory contentions so forcefully advanced by Mountain States, et al., are views shared by Governor Lamm who directed the Attorney General to intervene. The Colorado Supreme Court has held that C.R.S. 1973, 24-31-101(1)(a) grants the Attorney General the exclusive right, in the absence of another statute providing otherwise, to represent the State in actions to protect its interests. *State Board of Pharmacy v. Hallett,* 296 P. 540 (Colo. 1937).

Following intervention, the Attorney General vehemently opposed all of the constitutional challenges advanced by petitioners. His sole and only challenge involved the possible imposition of limitations on federal financial assistance and ban on construction. The Attorney General argues that in light of the good faith efforts of the State in achieving compliance, the imposition of sanctions during the 1980 legislative session would be arbitrary, capricious and unreasonable. At no time, did the Colorado General Assembly request the Attorney General to appear for the State and advance the contentions made herein by Mountain States, et al.

Nothing in the record indicates the enactment of any resolution or declaration by the Colorado General Assembly indicating a "consensus" with the contentions advanced by the twenty-seven legislators who are petitioners herein. For standing purposes, "abstract injury" does not suffice for the required "injury in fact." *O'Shea v. Littleton,* 414 U.S. 488 (1974).

Thus, on the state of the record before us, we must hold that the *only* party with the requisite "standing" to challenge the actions of the EPA Administrator is the State of Colorado, represented here solely by the Colorado Attorney General by virtue of statutory and executive authority. The general rule is that, by virtue of constitutional and/or statutory provisions or common-law power, the state attorney general, as chief law officer of the state, is the exclusive legal representative of the state in all litigation with regard to matters of public interest, and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest. *See* 7 C.J.S., Attorney General, §8(c) and cases cited; 7 Am. Jur.2d, Attorney General, §11 and cases cited. Again, we pointedly observe that, with the exception of the threatened imposition of sanctions by EPA, the State of Colorado flatly contradicts the contentions of Mountain States, et al., that the State of Colorado, its citizens and legislators, have suffered any constitutional harm or injury. The Attorney General, to the contrary, vehemently contends that the State of Colorado has not suffered any concrete injury as a result of the EPA Administrator's actions under authority of the Clean Air Act. "Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 220-221 (1974).

We take no position as to the utterly conflicting views involving the constitutional and statutory challenges posited by Mountain States, et al. In light of our ruling on the "standing" issue, the conflict does not present a justiciable case. It does, of course, present sharp political and ideological differences of substantial import. These are not matters, however, properly directed to this Court for resolution in view of the fact that the *only* party with standing to advance them has elected not to do so. The complaints registered herein directed at the alleged unlawful actions of the EPA Administrator are, in reality, complaints against the Congress of the United States which enacted the Clean Air Act, as amended. The 1977 amendments to that Act included the provisions directing

administrative imposition of the sanctions.

On June 13, 1980, EPA proposed approval of the Governor's submittal of the revised Colorado SIP relative to the motor vehicle emissions control program and solicited comments on this action. *See* 45 Fed. Reg. 40167. The notice of final rulemaking approving Colorado's automobile exhaust emissions control program for inclusion in its SIP and removing the federal funding and stationary source construction restrictions was executed under date of July 10, 1980. It was published and became effective July 16, 1980. *See* 45 Fed. Reg. 47682. As previously noted, the Colorado Attorney General has taken no position on the mootness issue. We hold that the aforesaid final rulemaking action does, under the circumstances of this case, render any and all contentions raised and advanced by the State of Colorado, as intervenor, moot.

The petition for review is dismissed.

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[1] A non-profit corporation, organized "as a public interest law center dedicated to bringing before the courts those issues vital to individual rights and freedoms protected by the United States Constitution and the nation's legal traditions," whose offices are in Denver, Colorado, on behalf of its officers, members, and supporters who reside within the "nonattainment" areas affected by the challenged action and in the remainder of the State of Colorado, and who are being deprived of their constitutional and statutory rights.

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[2] Indeed petitioners have not even responded, in their brief, to respondents' arguments in its Memorandum in Opposition to Petition for Stay that they lack standing in this case to make any constitutional arguments on behalf of the state.

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY*

40 CFR Part 52

[FRL 1333-7]
[44 Fed. Reg. 57401 (October 5, 1979)]

Final Rulemaking on Approval of
Colorado State Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final Rulemaking.

*NOTE: Portions of the EPA Final Rulemaking that are not relevant to this Petition for Certiorari and that were not reviewed by the lower court have been omitted.

SUMMARY: The purpose of this notice is to approve, in part, the State Implementation Plan (SIP) revision for Colorado which was received by EPA on January 2, 1979. In addition, EPA is taking final action to conditionally approve some elements of the Colorado SIP. The conditional approval requires Colorado to submit additional materials to satisfy the conditions. This plan revision was prepared by the State to meet the requirements of Part D (Plan Requirements for Nonattainment Areas) of the Clean Air Act (the Act), as amended in 1977. On May 11, 1979 (44 FR 27693), EPA published a notice of proposed rulemaking which described the nature of the SIP revision, discussed certain provisions which in EPA's judgment did not comply with the requirements of the Act, and requested public comment. Numerous comments were received.

The Environmental Protection Agency (EPA) has reviewed public comments received on the May 11, 1979, proposal and is taking the following actions:

1. Approval — a. Strategy for Colorado Springs (The urbanized area) as defined by the continuing, comprehensive, and coopera-

tive planning process (3-C). Total Suspended Particulates (TSP); b. Strategy for Grand Junction (Mesa designated area) TSP; c. Strategy for Denver (3-C urbanized area), Nitrogen Dioxide; d. Strategy for Denver (designated area), TSP.

2. Conditional Approval — a. Denver (Counties of Arapahoe, Adams, Denver, Jefferson, Boulder, and Douglas), Ozone and Carbon Monoxide (CO); b. Colorado Springs (3-C urbanized area), CO; c. Larimer-Weld Region (Fort Collins and Greeley) CO; d. Strategy for Pueblo (3-C urbanized area), TSP; e. Regulation 3, "Process for Emission Permit Review"; f. Regulation 7 "Volatile Organic Compounds"; g. Inspection/Maintenance Program; h. Section 172(b)(11)(A) of the Act (Alternatives Analysis).

3. No final action — a. Colorado Springs (El Paso County), Ozone; b. Larimer-Weld (designated area), TSP; c. Larimer-Weld Counties, Ozone; d. Larimer-Weld Transportation Control Measures Schedules (proposed elsewhere); e. Denver Transportation Control Measures Schedules (proposed elsewhere).

4. Disapproval — Regulation 3, Legal Authority Under Section 110 of the Act.

Elsewhere in today's Federal Register, EPA is inviting public comment on the acceptability of deadlines for complying with the conditions of approval. Also in that same notice, EPA is requesting comment on the acceptability of transportation control measures schedules for Denver and Larimer-Weld, submitted by the State on July 27, 1979, and July 5, 1979, respectively.

EPA has also chosen to take no action in areas which are being proposed for redesignation to unclassifiable or attainment under Section 107 of the Act and on the transportation control measures schedules for Denver and Larimer-Weld. Until EPA's "Final Rulemaking" on the redesignations, the SIP for these areas will not be approved.

In this notice the SIP is summarized, issues resulting in SIP approval, conditional approval and no action are discussed, and EPA's responses to relevant comments received on its proposal are included. It should be noted that only the requirements with respect to Part D of the Act are discussed, with one exception, Regulation 3.

EFFECTIVE DATE: Effective October 5, 1979.

FOR FURTHER INFORMATION CONTACT: Robert R. DeSpain, Chief, Air Programs Branch, Environmental Protection Agency, Region VIII, 1860 Lincoln Street, Denver, CO 80295, (303) 837-3471.

SUPPLEMENTARY INFORMATION:

Introduction

The information in this notice is divided into five sections entitled "INTRODUCTION," "BACKGROUND," "SIP DEFICIENCIES/CONDITIONAL APPROVAL," "PUBLIC COMMENTS ON PROPOSAL," and "EPA ACTIONS." This first section outlines the development of the Colorado SIP revision. The "BACKGROUND" section describes the Colorado SIP revision for each nonattainment area. The "SIP DEFICIENCIES/CONDITIONAL APPROVAL" section describes where the SIP is inadequate because it did not accomplish enough and gives schedules and deadlines to correct these deficiencies, and how some deficiencies cited in the proposal were satisfied by the Governor's supplemental submittals on July 5, July 23, and July 27, 1979. The "PUBLIC COMMENTS ON PROPOSAL" section summarizes relevant comments received on the proposal and EPA's response to them. The "EPA ACTIONS" section explains EPA decision to approve, conditionally approve, or take no action, on the SIP based on considerations discussed in the two preceding sections.

The Colorado SIP revision was developed and submitted to EPA in response to the requirements of Part D of the Act. In general, the SIP is required to provide for attainment and maintenance of the national ambient air quality standards (NAAQS) for all areas which have been designated "nonattainment" pursuant to Section 107 of the Act. Specific requirements for an approvable SIP are discussed in detail in the April 4, 1979, Federal Register (44 FR 20372).

On March 3, 1978 (43 FR 8962) and on September 11, 1978 (43 FR 40419), pursuant to Section 107 of the Act, EPA designated certain areas as nonattainment based on existing violations of the NAAQS. The designated nonattainment areas in Colorado are displayed in Table 1.

[Table omitted.]

In accordance with Section 174 of the Act, primary responsibility for preparing carbon monoxide (CO) and ozone control plans was delegated by the Governor to organizations of local elected officials. These organizations are the Pikes Peak Area Council of Governments (PPACG) for the Colorado Springs nonattainment areas the Denver Regional Council of Governments (DRCOG) for the Denver Region nonattainment areas, and the Larimer-Weld Regional Council of Governments (LWRCOG) for Larimer and Weld Counties. Designated regional planning agencies were generally responsible for development of transportation control

measures, which were coordinated with the transportation planning process. The State was responsible for technical support to designated agencies as well as for Inspection/Maintenance (I/M) programs, stationary source control, new source review and any other programs encompassing areas beyond the authority of local governments.

. . . .

The locally prepared plans were submitted to the Colorado Air Quality Control Commission (Commission) during fall of 1978. The Commission modified each locally prepared plan prior to incorporation into the SIP. The Commission deemed such changes necessary to make the various locally prepared plans consistent with each other, with State policy, and with Federal requirements.

Following a public hearing, the Commission adopted the SIP and submitted it to the Governor of Colorado. The Governor submitted the SIP to EPA on January 2, 1979. The submittal was followed by a letter from the Governor on January 5, 1979, requesting time extensions for certain areas for meeting the CO and/or ozone standards.

In a January 19, 1979, letter to the Governor, EPA identified several items which required clarification and others which were omitted. On January 31, 1979, EPA received a partial response from the Air Quality Control Division, the technical support organization within the Department of Health, which contained information that was of assistance to EPA in its continuing review and a schedule for submitting the additional required information.

In a meeting between EPA and State officials on March 13, 1979, additional issues were raised by EPA. The Division responded by submitting clarifying material to EPA on March 15, 1979. EPA proposed action on the SIP revision in the Federal Register on May 11, 1979.

On July 5, 1979, the Governor submitted the final comments of the commission with respect to issues raised in EPA's proposed action. On July 23, 1979, the Governor submitted, as part of the SIP, House Bills 1109 (the revised Colorado Air Quality Control Act), 1090 (amendments to the provision for burning solid wastes), and Senate Bill 1 (provisions for reducing motor vehicle emissions). At this time, EPA is taking no action on House Bill 1109 but will soon propose action in the Federal Register to invite comments on its acceptability. On July 27, 1979, the Governor submitted the DRCOG schedules for implementation of the transportation control strategies. Action is proposed on these schedules and on the

schedules for Larimer-Weld elsewhere in today's Federal Register.

Background

The following discussion describes the nature of the air quality problems, the SIP revision for each nonattainment area, and related regulations.

For the areas where the Governor has requested redesignations, Larimer-Weld (primary TSP, ozone) and Colorado Springs (ozone), EPA has chosen to take no action on these portions of the SIP.

Colorado Springs Area

I. *Carbon Monoxide.* The Colorado Springs plan predicts attainment of the 8-hour CO standard during 1985 with implementation of the Federal Motor Vehicle Emission Control Program (FMVECP), an I/M program yet to be adopted, the Federal high altitude emission standards to be adopted for model year (MY) 1981, and the transportation control measures that are currently programmed for implementation. The plan also predicts reasonable further progress (RFP) towards attainment. The transportation control measures include transit improvements, improved carpool locator service, and traffic flow improvements.

The PPACG conducted a preliminary screening of all the transportation control measures in section 108(f) of the Act and determined that certain measures required more study before a specific commitment to implement them could be made. Consequently, the plan provides that some of the measures will be analyzed and implemented prior to 1982 if they are found to be feasible for the area. The remaining measures will be analyzed as part of the long term transportation planning process with the completion of the analyses scheduled for February 1980; and implementation expected prior to 1985.

The City Council and County Commissioners adopted the CO plan. The schedules for developing and implementing measures that were provided in the locally prepared plan also constitute a commitment to implement the plan and to provide adequate resources.

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Denver Area

I. *Nitrogen Dioxide.* The Denver area plan predicts attainment of the standard by 1982 as a result of the FMVECP. The NO_2 prediction was made using a linear rollback model.

II. *Carbon Monoxide and Ozone.* The analysis in the Denver

plan predicts attainment of the 8-hour CO standard in 1987. This estimate assumes no additional controls beyond the FMVECP, and I/M program yet to be adopted, Regional Transportation District (RTD, Denver's public transit operator) Transit Development Plan (TDP), and the DRCOG carpool locator service. However, an additional 43% reduction would still be needed to achieve the standard by 1982.

Based on the same assumptions used in the CO modeling, the predicted 1987 ozone concentration exceeds the standard. Based on the predicted ozone concentration in 1982, an additional reduction of about 19% would still be necessary to meet the standard. A different set of assumptions was used in additional analyses (submitted July 27, 1979) which do show attainment by 1987.

The transportation measures included in the plan are commitments to either implement or study an expanded I/M program and possible implementation of retrofit (study), EPA implementation of the high altitude standards, smoking vehicle ordinances, TDP implementation and analysis by RTD of alternate funding sources, employer based incentives for ridesharing, variable work hours (study and demonstration), vanpool demonstration program, expanded carpool matching service, bicycle plan implementation and demonstration project, revised transportation project programming process to provide priority to air quality projects, high occupancy vehicle (HOV) lane study and implementation (where feasible), no drive day, Sante Fe Drive HOV lane, parking management plan, and land use assessment handbook (CO hotspot analysis).

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Larimer-Weld Area. . .

II. *Carbon Monoxide*. The Larimer-Weld plan analysis predicts attainment of the CO standard by 1986 and 1984 in Fort Collins and Greeley, respectively, with implementation of the FMVECP, an I/M program yet to be adopted, and the adopted transportation control measures.

The transportation control measures in Section 108(f) adopted for implementation by the City of Greeley by 1982 are improved public transit, bicycle lanes, staggered work hours, vehicle fleet controls, and traffic flow improvements.

The measures adopted for implementation by the City of Fort Collins by 1982 are improved public transit, expanded carpool locator service, bicycle lanes, and traffic flow improvements at specified locations.

A commitment to implement the adopted control measures and to provide the resources needed to carry out the plan is provided in the form of resolutions adopted by each city and by LWRCOG.

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State Regulations

Section 172 of the Act requires that reasonably available control technology (RACT) be applied to existing stationary sources of air pollution in nonattainment areas. The Commission has eleven (11) air pollution control regulations of which three (3) must satisfy this RACT requirement. Regulation 1, which controls particulates, visible emissions, and sulfur oxides from stationary sources was revised for existing sources of sulfur oxides and for existing iron and steel facilities. Regulation 5 contains requirements for the control of existing alfalfa dehydration plants. Regulation 7, which provides for control of volatile organic compounds, was revised extensively.

In addition to the RACT requirements, Regulation 3, which includes the new stationary source review program, was revised to be consistent with the requirements of Section 173 of the Act. Regulation 9 requires large employers to offer incentives to employees to commute to and from work in other than single occupant vehicles. The incentives include providing information on bus routes, providing preferential parking to carpools and vanpools, and providing bicycle parking facilities. Regulation 10 establishes criteria that will be used to determine whether transportation projects and programs conform to the SIP as required under Section 176(c) of the Act and pursuant to Department of Transportation requirements in 23 U.S.C. 109(j) and 23 CFR Part 770. EPA is deferring action on Regulation 10 and will propose approval or disapproval in the near future. Regulation 11 provides requirements for the licensing and certification of inspectors, inspection facilities and emission measurement equipment for the inspection/maintenance program.

SIP Deficiencies/Conditional Approval

This section contains a discussion of deficiencies identified by EPA in the May 11, 1979, proposed rulemaking and during the public comment period, and includes deadlines and schedules to correct them.

These deficiencies are summarized first by portions of the SIP that apply statewide and were prepared by the Commission, and then by local plans prepared by the regional planning agencies. Also included in this section are clarifications by the Commission on

deficiencies raised in the proposed rulemaking.

State-Developed SIP Provisions

1. *Inspection/Maintenance.* Section 172(b)(11)(B) of the Act requires that when the necessity for an extension for the attainment date for ozone in Denver and CO in Denver, Colorado Springs, and Larimer-Weld from 1982 up to 1987 has been demonstrated, the State must establish a specific schedule for implementing a motor vehicle I/M program. The Commission has demonstrated the need for an extension for CO and ozone in these areas. The Colorado legislature, in recognition of the need for an I/M program in these areas, passed Colorado Senate Bill 1 (as amended June 8, 1979). This bill initiates a program on January 1, 1981, for the Denver, Colorado Springs and Larimer-Weld metropolitan areas including a total of nine counties for 1968-79 model years. The bill also describes how the State will consider program alternatives. However, Colorado Senate Bill 1, as amended June 8, 1979, does not provide adequate enabling authority to establish an effective I/M program and cannot be unconditionally approved by EPA. The reasons for this are as follows:

1. Colorado Senate Bill 1 does not provide for a re-test after required adjustments are performed. Without such a re-test there is no way of confirming that the adjustments will be correctly performed, or if additional maintenance is required to bring a vehicle into compliance. There is also no provision for additional maintenance to ensure this compliance. Because of these deficiencies, it has not yet been shown that the emission reductions presumed in the plan will result.

2. Colorado Senate Bill 1 contains no emission standards nor does it provide authority to establish such standards to determine pass or fail of a motor vehicle. Without emission standards, an I/M program is not enforceable. Rather, the Bill directs the Commission to recommend standards to the legislature, which must approve such standards by legislation. Also Senate Bill 1 provides that all regulations adopted by the Commission expire on June 1 of the following year unless specifically approved by the legislature. Both these problems could impede the implementation and continued operation of an effective I/M program.

3. The program outlined in Senate Bill 1 may not be appropriate for 1981 and later model year vehicles since significant changes in automotive emission control technology will result in the partial or complete elimination of the adjustments specified in the Bill.

In addition to these deficiencies, the Colorado I/M program also lacks the following:

1. Schedules (milestones, dates, responsible agency) to implement the following I/M program elements; a public information program, certification of full legislative authority to carry out the program (including emission standards), initial notification of garages explaining the program and a schedule of implementation, initiation of construction of referee facilities, completion of construction of referee facilities, adoption of procedures for certification of inspection stations, completion of equipment purchase and delivery of equipment, initiation of hiring and training of inspectors or licensing of garages, initiation of introductory program (voluntary maintenance with either voluntary or mandatory inspection) if not previously initiated, initiation of mechanics training and/or information program, initiation of mandatory inspection, initiation of mandatory repair for failed vehicles, and establishment of quality control procedures.

2. Provisions for recordkeeping, submittal of appropriate records by inspection facilities, and periodic and unannounced inspections of facilities.

3. A demonstration of an commitment to at least a 25% reduction in light duty vehicle exhaust emissions of carbon monoxide and hydrocarbons by December 31, 1987, compared to what the total emissions would be without the I/M program.

4. A commitment to implement and enforce the program.

Colorado Senate Bill 1 authorizes a study to compare the effectiveness of an emissions control program which requires motor vehicles to be inspected for exhaust gas emissions by means of an infrared analyzer with a program requiring adjustment of all motor vehicles to certain manufacturer's specifications in order for vehicles to obtain a certification of emission maintenance. The study will examine the use of exhaust gas emission standards designed to ensure no less than twenty, thirty, or forty percent of the vehicles fail such standards, and which requires vehicles which fail such inspection to be repaired to comply with such standards.

In addition, Senate Bill 1 contains a commitment that the study will be completed by January 1, 1980, and the general assembly will review the results of the study and pass appropriate additional legislation by March 1, 1980, to meet Act requirements.

EPA considers that the State is committed to adopting an acceptable program based on the results of the above study by March 1, 1980, and that this represents progress toward submitting a plan. It

is clear, however, that the program passed by the legislature does not meet the requirements of the Clean Air Act and additional action by the legislature is essential. There was misunderstanding on the part of some of the legislators concerning whether EPA could approve the program established in Senate Bill 1. Thus, EPA considers that the State of Colorado has satisfied the condition for an extension of the deadline for certification of adequate legal authority for an I/M program to March 1, 1980 (44 FR 20377, footnote 27, April 4, 1979). Therefore, EPA conditionally approves this part of the SIP if adequate I/M legal authority is certified by March 1, 1980, and submitted to EPA, along with materials correcting the other identified deficiencies. The conditional approval is based on the State meeting the following schedule:

January 1, 1980 — Senate Bill 1 study completed, submitted to legislature.

January 12, 1980 — I/M included on list of Governor's Call items for the 1980 legislative session.

February 1, 1980 — Study results in the form of a draft final report reported to legislature.

February 1, 1980 — Bill introduced in the legislature — copy submitted to EPA.

March 1, 1980 — Submission to EPA of legislation signed into law by the Governor, as well as schedules (milestones, dates, responsible agency) to implement the I/M program and corrections to other noted deficiencies.

A notice soliciting public comment on the acceptability of this schedule appears elsewhere in today's Federal Register.

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Clarification by Commission

On July 5 and July 27, 1979, the Governor submitted final comments by the Commission on issues identified in EPA's proposal. This information helped clarify some of the issues. These clarifications are as follows:

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II. *Expeditious Attainment.* Sections 172(a)(2) and 172(b)(11)(C) of the Act require the plan to demonstrate attainment of the ozone and CO standards as expeditiously as practicable, but no later than December 31, 1987, if a demonstration is made that attainment is not possible by December 31, 1982.

The Commission revised the request for extensions of the attain-

ment dates to reflect the actual expected dates of attainment of the CO standard. This revised extension request submitted on July 5, 1979, seeks extension in CO attainment beyond the end of 1982 to December 31, 1985, in Colorado Springs, to December 31, 1986, in Fort Collins, and to December 31, 1984, in Greeley. EPA finds these revised dates acceptable.

III. *Denver Area Ozone and CO Attainment Demonstration.* The ambient ozone concentration predicted for Denver in 1987 was 0.127 ppm which exceeds the standard. Therefore, the measures needed to show attainment were not provided. Also, EPA considered the ozone improvement between 1982 and 1987 to lack adequate technical justification.

Computer model "compliance runs" for carbon monoxide and ozone have not yet been made due to the difficulties experienced by the Division in obtaining the necessary vehicle travel pattern data for 1982 and 1987. As a result, definitive RFP curves were not submitted to EPA. Instead, a preliminary RFP curve for CO attainment was provided which was based upon use of the "rollback" analysis technique. The preliminary RFP curve for ozone attainment reflected a commitment to attain the ozone standard by the end of 1987, rather than any calculation of actual reductions over time. It is recognized, however, that a "compliance run" and its attendant analyses realistically could not be completed by July 1, 1979. In light of this situation, the Commission has prepared an interim ozone compliance assessment, using the linear rollback method.

Using the rollback technique, it is estimated that ozone concentrations of 0.137 ppm will be achieved in 1982, and of 0.119 ppm in 1987. EPA approves this attainment and reasonable further progress demonstration.

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V. *Transportation Development Plan.* On July 27, 1979, in a letter to EPA, the Governor stated that the TDP was a portion of the SIP, and he emphasized the necessity for flexibility through annual updates. EPA is approving the TDP on the basis of the Governor's submittal. We understand that RTD and DRCOG may not be committed to carry out the TDP in its entirety if the required funds are not available. Unless the TDP portion of the SIP is revised, the implementation of the TDP will be enforceable as part of the SIP and projects included in the TDP must, at a minimum, receive priority in federal funding decisions. Furthermore, if the State intends to use the TDP to partially satisfy the requirements of

Section 110(a)(3)(D) of the Act, all available Federal, State and local funds must be used, insofar as is necessary, to implement the TDP.

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Section 172(b)(11)(A)

On August 14, 1979, EPA received clarification from the Division that the Division had the authority under recently passed legislation (House Bill 1109) to adopt this program.

EPA is conditionally approving this part of the SIP provided the State adopts this program by March 1, 1980 elsewhere in today's Federal Register. EPA is requesting comments on the acceptability of the March 1, 1980, deadline.

Public Comments on Proposal

This section includes the relevant comments EPA received on the proposal and EPA's response.

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Denver Area Ozone and CO

Several commentors found the ozone and CO plans deficient due to the failure to adopt all RACM. The commentors were not satisfied with the approach selected by DRCOG to evaluate the 18 transportation control measures required by section 108(f) of the Act. Some comments suggested control measures not provided for in Section 108(f).

Several commentors suggested that administrative procedures require EPA to propose action and provide the public an opportunity to comment on all materials submitted by the Commission to resolve deficiencies cited in EPA's proposal.

EPA agrees that final action cannot be taken on the detailed schedules submitted on July 27, 1979, and elsewhere in today's Federal Register is proposing action on these schedules and soliciting public comment on their acceptability. Conditional approval of the Denver CO and ozone plans is based on the State's timely submission of the necessary additional materials.

One commentor suggested that EPA disapproved Denver's reasonable further progress demonstration because the plan did not provide uniform emission reductions each year, and suggested that this rationale was not appropriate. EPA's proposed disapproval was based on the lack of incremental reductions rather than a lack of uniform emission reductions. The Act does not require uniform emission reductions each year.

There were several comments concerning the relationship of the

TDP to the plan. DRCOG stated that only the goal of doubling ridership was to be part of the plan, RTD provided the opposite opinion, and other commentors found it unclear. As indicated in the Governor's July 27, 1979, letter to EPA, the TDP is part of the SIP.

Sanctions

Several commentors suggested that sections 176(c) and (d) of the Act require that highway construction work in Denver be halted by withholding funds until the Denver SIP is approved. EPA disagrees with this comment and believes that, instead, Section 176(a) of the Act must be used to determine whether highway funds should be withheld. Under Section 176(a), highway funds available under Title 23, USC, may only be withheld if the EPA Administrator finds that the Governor has not made reasonable efforts to submit a plan which considers each of the elements required by Secsion 172. EPA believes the State has made a reasonable effort. However, as indicated elsewhere in this notice, if the State fails to meet any of the deadlines associated with this conditional approval action, EPA will immediately propose a finding under Section 176(a) and highway funds with be withheld.

Extensions

One commentor stated that failure to satisfy section 172(b)(11)(A) of the Act should not be reason for denial of the Governor's request for attainment date extensions. EPA agrees that the extension request should be granted when a demonstration shows attainment by 1982 is not possible even if Section 172(b)(11)(A) is fulfilled. However, in such a case, failure to satisfy the requirement would be grounds for disapproval of the SIP.

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EPA Action

EPA approves the revised SIP for the areas described in the SUMMARY, because the SIP has satisfied all the Part D plan requirements for those nonattainment areas and has met the basic criteria for approving a plan revision under section 110(a)(3)(A) of the Act.

EPA conditionally approves the Denver ozone and the Denver, Colorado Springs, and the Larimer-Weld CO plans, which require I/M to demonstrate attainment provided the following requirements are met:

1. The Denver Area ozone and Denver Area, Colorado Springs and Larimer-Weld CO plans include an adequate vehicle emission control I/M program by March 1, 1980.

2. The Denver Area ozone plan provides for implementation of RACT for stationary sources of VOC's by March 1, 1980.

3. The Commission revises Regulation 3 to make it consistent with Section 173 of the Act by March 1, 1980.

4. The Larimer-Weld transportation control schedules are submitted by January 1, 1980.

5. The Denver transportation control schedules are revised to meet EPA requirements by January 1, 1980.

6. The Commission adopts a program to implement Section 172(b)(11)(A) of the Act by March 1, 1980.

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A notice soliciting comments on the acceptability of these schedules appears elsewhere in today's Federal Register.

Because of the importance of the conditions presented above, in particular the importance of an effective I/M program in Colorado, EPA intends to implement the sanctions contained in Section 176(a) and 316 of the Act without delay should the State fail to comply with the conditions and deadlines. Therefore, EPA is taking the necessary preparatory steps now such as notifying relevant State and local officials and concerned Federal agencies including Federal Highway Administration and the Urban Mass Transportation Administration. The steps for applying these funding limitations are proposed in 44 FR 33473 (June 11, 1979), and 44 FR 38575 (July 2, 1979).

It is EPA's intention that if the State of Colorado fails to meet the above conditions, withholding of funds under Section 316 would begin not later than March 1, 1980, and EPA would simultaneously transmit a notice to the Federal Register proposing a finding under Section 176(a), which upon publication would prohibit award of EPA air grants or approval or funding of highway projects under Title 23, USC. If at any time prior to March 1, 1980, it becomes evident an acceptable I/M program is not likely to be enacted, this schedule for implementing Sections 176 and 316 will be accelerated.

If an effective I/M program is not adopted by March 1, 1980, the sanctions would be imposed in the Colorado Springs, Larimer-Weld, and Denver nonattainment areas. Due to potentially severe impacts resulting from the imposition of sanctions, it is vital that the effects be well understood. To that end, the following represents examples of projects and programs scheduled for funding in the near future which may be affected:

1. EPA Section 105 and 175 grants withheld from date of the

violation of the conditional approval to the end of the fiscal year (all areas).

2. Sewage Treatment grants for the following projects may be affected:

Major projects	Step	Grant amount
a. Boulder	3	$8,625,000
b. Brighton	2	375,000
	3	5,625,000
c. Colorado Springs (Phase II)	2	1,125,000
	3	11,500,000
d. Denver Metro S.D.	2	2,090,000
(main plant)	3	30,000,000
e. Denver Metro S.D. (off-site solids)	3	24,000,000
f. Denver Metro S.D. (Sand Creek)	3	9,500,000
g. Denver Metro S.D. (Clear Creek)	2	300,000
h. Englewood/Littleton	2	250,000
	3	10,000,000
i. Fort Collins	3	952,500
j. Greeley (New Plant)	3	15,000,000
(interceptor)	3	1,575,000
k. South Lakewood	3	1,335,000
l. Westminster	3	9,500,000
m. Weld County Tri-Area	3	800,000

3. Federal highway funds, except for safety, mass transit and transportation improvement projects related to air quality improvement or maintenance. According to EPA's and DOT's proposed Section 176(a) procedures, the latter exemption only includes transportation control measures included in the approved or promulgated SIP and projects which are specifically identified as air quality improvement projects in the Transportation Improvement Program.

If Colorado does not submit any of the materials needed to comply with the above conditions, EPA will publish a Federal Register notice at the expiration of the time limit for submittal ending the conditional approval and explaining that the Section 110(a)(2)(I) (44 FR 38583) July 2, 1979, restrictions are automatically imposed under the Act. These restrictions prohibit the construction of certain new major sources of air pollution in affected non-attainment areas. Also Section 105 and 175 grants may be withheld.

If the State submits the required additional documentation according to schedule EPA will publish a notice in the Federal Register announcing receipt of the material. The notice of receipt will also announce that the conditional approval is continued pending EPA's final action on the submission.

EPA will evaluate the State's submission to determine if the condition is fully met. After review is complete, a Federal Register notice will be published proposing or taking final action either to find the condition has been met and approve the plan, or to find the condition has not been met and disapprove the plan. If the plan is disapproved the section 110(a)(2)(I) sanctions will be in effect.

Elsewhere in today's Federal Register, deadlines by which conditions must be met are being proposed. Although public comment is solicited on the deadlines, and the deadlines may be changed in light of comment, the State remains bound by its commitment to meet the proposed deadlines unless they are changed.

The 1978 edition of 40 CFR Part 52 lists in the subpart for each state the applicable deadlines for attaining ambient standards (attainment dates) required by Section 110(a)(2)(A) of the Act. For each nonattainment area where a revised plan provides for attainment by the deadlines required by Section 172(a) of the Act, the new deadlines will be substituted on the attainment date charts. The earlier attainment dates under Section 110(a)(2)(A) will be referenced in a footnote to the charts. Sources subject to plan requirements and deadlines established under Section 110(a)(2)(A) prior to the 1977 Amendments remain obligated to comply with those requirements as well as with the new Section 172 plan requirements.

Congress established new deadlines under Section 172(a) to provide additional time for previously regulated sources to comply with new, more stringent requirements and to permit previously uncontrolled sources to comply with newly applicable emission limitations. If these new deadlines were permitted to supersede the deadlines established prior to the 1977 Amendments, sources that failed to comply with pre-1977 plan requirements by the earlier deadlines would improperly receive more time to comply with those requirements. Congress, however, intended that the new deadlines apply only to new, additional control requirements and not to earlier requirements. As stated by Congressman Paul Rogers in discussing the 1977 Amendments:

> Section 110(a)(2) of the Act made clear that each source had to meet its emission limits "as expeditiously as

> practicable" but not later than three years after the approval of a plan. This provision was not changed by the 1977 Amendments. It would be a perversion of clear Congressional intent to construe part D to authorize relaxation or delay of emission limits for particular sources. The added time for attainment of the national ambient air quality standards was provided, if necessary, because of the need to tighten emission limits or bring previouslyuncontrolled sources under control. Delays or relaxation of emission limits were not generally authorized or intended under part D. (123 Cong. Rec. H 11958, daily ed. November 1, 1977.)

To implement fully Congress' intention that sources remain subject to pre-existing plan requirements, sources cannot be granted variances extending compliance dates beyond attainment dates established prior to the 1977 Amendments. Such variances would impermissibly relax existing requirements beyond the applicable section 110(a)(2)(A) attainment date under the plan. Therefore, for requirements adopted before the 1977 Amendments, EPA cannot approve a compliance date extension beyond pre-existing 110(a)(2)(A) attainment dates, even though a Section 172 plan revision with a later attainment date has been approved.

However, in certain exceptional circumstances, extensions of compliance dates beyond a pre-existing attainment date are permitted. For example, if a Section 172 plan imposes new, more stringent control requirements that are incompatible with controls required to meet the pre-existing regulations, the pre-existing requirements and deadlines may be revised if a state makes a case-by-case demonstration that a relaxation or revocation is necessary. In addition, such an extension may be granted if it will not contribute to a violation of an ambient standard or a PSD increment.[1]

Under Executive Order 12044, EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA labels these other regulations "specialized." I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

This notice of final rulemaking is issued under the authority of Section 110 of the Clean Air Act, as amended.

Dated: September 27, 1979.

Douglas Costle,

Administrator.

Title 40, Part 52 of the Code of Federal Regulations is amended as follows:

Subpart G — Colorado

1. In §52.320, paragraphs (c)(10)-(c)(15) are added as follows:

§52.320 Identification of plan.

* * * * *

(c) * * *

(10) On January 2, 1979, the Governor submitted the nonattainment area plan for all areas designated nonattainment as of March 3, 1978. EPA is taking no action on areas for which the Governor has requested redesignations (Larimer-Weld TSP and ozone; El Paso County ozone).

(11) Extension request for attainment of CO and O_3 was submitted by the Governor on January 5, 1979.

(12) On July 5, 1979, the governor submitted the Air Pollution Control Commission's final comment on our May 11, 1979, proposal. This included a clarification that the "No-Drive Day" was not part of the State Implementation Plan and transportation control measures schedules for Larimer-Weld.

(13) On July 18, 1979, the Commission committed to revising Regulation 7.

(14) On July 23, 1979, the Governor submitted House Bills 1109, 1090, and Senate Bill 1 as part of the plan.

(15) On July 27, 1979, the Governor submitted the Denver Regional Council of Governments schedules for implementing the transportation control strategies, and clarified that the Transportation Development Plan was part of the plan.

§52.321 [Amended]

2. Section 52.321 is amended by changing the heading "photochemical oxidants (hydrocarbon)" to "ozone."

3. In §52.322, paragraphs (c), (d) and (e) are added as follows:

§52.322 Extensions.

* * * * *

(c) The Administrator hereby extends for 18 months (until July 1, 1980) the statutory time table for Colorado's plans for attainment and maintenance of the secondary standards for particulate matter

in Denver, Grand Junction, Colorado Springs, Pueblo and Larimer-Weld nonattainment areas (40 CFR 81.306).

(d) The Administrator hereby extends to December 31, 1987, the attainment date for ozone in the Denver nonattainment area (40 CFR 81.306).

(e) The Administrator hereby extends to December 31, 1987 (Denver), December 31, 1985 (Colorado Springs), December 31, 1986 (Fort Collins), and December 31, 1984 (Greeley), the attainment dates for carbon monoxide in these nonattainment areas (40 CFR 81.306).

4. Section 52.323 is revised to read as follows:

§52.323 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Colorado's plan for the attainment and maintenance of the national standards under Section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

5. In §52.324 a new paragraph (c) is added as follows:

§52.324 Legal Authority

* * * * *

(c) The requirements of §51.11(a)(4) of this chapter are not met since Regulation 3 provides that an emission permit be issued when statutorily-defined time limits have been exceeded.

6. Section 52.325 is revised as follows:

§52.325 Attainment dates for national standards.

The following table presents the latest dates by which the national standards are to be attained. These dates reflect the information presented in Colorado's plan, except where noted.

[Table omitted]

7. Section 52.327 is revised as follows:

§52.327 Control strategy: Ozone.

(a) *Part D — Conditional Approval* — The Denver Plan is approved provided that the following conditions are satisfied:

(1) The plan includes an adequate vehicle emissions control inspection/maintenance program.

(2) The plan provides for implementation of reasonable available control technology on existing sources of volatile organic compounds.

(3) Regulation 3 is revised so that it is consistent with Section 173 of the Act.

(4) Section 172(b)(11)(A) programs adopted.

8.Section 52.328 is revised as follows:

§52.328 Control strategy: Carbon monoxide.

(a) *Part D — Conditional Approval* — The Denver, Colorado Springs and Larimer Weld plans are approved provided that the following conditions are satisfied:

(1) The plan includes an adequate vehicle emissions control inspection/maintenance program.

(2) Section 172(b)(11)(A) programs adopted.

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[1]See General Preamble for Proposed Rulemaking, 44 FR 20373-74 (April 4, 1979).